BEFORE THE ENVIRONMENT COURT

Decision No. [2013] NZEnvC 178

IN THE MATTER	of an appeal under Section 120 of the Resource Management Act 1991 (**"the Act"**)
BETWEEN	WEST COAST ENVIRONMENTAL NETWORK INCORPORATED (ENV-2011-CHC-000095)
AND	ROYAL FOREST AND BIRD SOCIETY OF NEW ZEALAND INCORPORATED (ENV-2011-CHC-000097)
	Appellants
AND	WEST COAST REGIONAL COUNCIL
	AND BULLER DISTRICT COUNCIL
	Respondents
AND	BULLER COAL LIMITED
	Applicant

Hearing: 12 June 2013

Court: Acting Principal Environment Judge LJ Newhook
Environment Commissioner WR Howie
Deputy Commissioner CM Blom

Appearances: J Appleyard, T Lowe and B Williams for Buller Coal Limited

P Anderson and S Gepp for Royal Forest and Bird Society of NZ Inc and (at the resumed hearing) West Coast Environmental Network Inc

Date of Decision: 7 August 2013

SECOND INTERIM DECISION OF THE ENVIRONMENT COURT

A. Consent is indicated, subject to final minor drafting on conditions of consent.

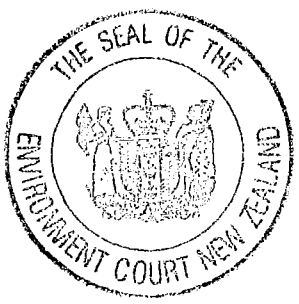
B. Costs remain reserved.

REASONS FOR DECISION

Introduction

[1] On 27 March 2013 the Environment Court issued an interim decision on appeals by West Coast Environmental Network Incorporated ("**WCEN**") and the Royal Forest and Bird Society of New Zealand Incorporated ("**Forest and Bird**") against a raft of consents granted by the Buller District Council ("**BDC**") and the West Coast Regional Council ("**WCRC**") to Buller Coal Limited ("**BCL**") to establish and operate an open cast coal mine at the Southern end of the Denniston Plateau. The Court indicated that it was likely to confirm the consents subject to BCL satisfying the Court as to the strength of certain conditions including some which were intended to give security to the environmental offsets it was proposing for the acknowledged adverse environmental effects the mine would generate. The Court invited the parties to work together on these proposed conditions.[1]

[2] Security for the proposed environmental offsets was indicated by us in the interim decision to be of considerable importance. Of particular concern, the land over which BCL proposed to establish its operations, and the land which it proposed to protect and improve by conducting weed and predator-control activities is not owned by the would-be consent holder, but by the Crown in the names of the Department of Conservation and Land Information New Zealand.[2] In consequence we were concerned that the benefits of the proffered biodiversity enhancement activities on and



[1] Decision [2013] NZEnvC 047
[2] [2013] NZEnvC 047, paragraph [1]

surrounding the Denniston Plateau and within the Kahurangi National Park ("**the DBEA**" and the "**HBEA**" respectively) were dependant on decisions of parties not before the Court. Further, that it was not within BCL's power to offer enhanced protection against environmental harm to a 745 hectare area, known as the Denniston Permanent Protection Area ("**the DPPA**"), which it proposed in the course of our earlier hearing.[3]

[3] Despite hard work by the parties to achieve appropriate conditions of consent, and agreement on the form of a great many of them, Forest and Bird remains of the view that they cannot be such as to justify consent. It submits that the conditions relating to the DPPA offer no guarantees of greater protection for the area than existed at the time of the Court's interim decision.[4] Further, it contends that the conditions relating to management plans conflate the specific requirements appropriately found in conditions with the details of how they will be achieved, properly a matter for management plans; in consequence the conditions unlawfully delegate the judicial function, and because they lack specific requirements, are potentially unenforceable.[5]

[4] In addition to the issues relating to the adequacy of consent conditions, there is a further issue before us. Following our interim decision, Forest and Bird appealed to the High Court. The High Court found that in one respect we had erred in treating the DBEA, and possibly the HBEA, as "offset/mitigation". It however specifically made no finding as to the materiality of that error. The learned Judge stated:[6]

> [12] ... the RMA keeps separate the relevant considerations of mitigation of adverse effects caused by the activity for which resource consent is being sought, from the relevant consideration of positive effects offered by the applicant as offsets to adverse effects caused by the proposed activity.
>
> ...
>
> [124] While I have disagreed with the Environment Court's use of the concepts of offset mitigation and of using "offset" and "compensation" interchangeably, I have no basis to judge whether refining the use of these terms, on the basis of this judgment, will materially affect the deliberations of the Environment Court.

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[3] See [2013] NZEnvC 047, paragraph 348
[4] Forest and Bird submissions, pp 12, 13, paragraph [27]
[5] Forest and Bird submissions, pp 12, 13, paragraphs [8(b)] and [7(b)]]
[6] CIV-2013-409-789 [2013] NZHC 1324, paragraph [123]

[5] So, in addition to the issue of adequacy of conditions, we must also consider whether our decision is materially affected by regarding the DPPA, DBEA and HBEA as offsets only, not as mitigation. It is convenient in fact to deal with that issue first.

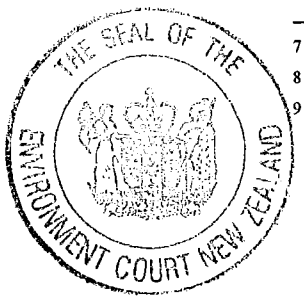
Is the decision materially affected by the necessity to distinguish "offsets" and "mitigation"?

[6] Although the High Court held that "mitigation" and "offsets" were separate concepts that needed to be distinguished, it refused to find, as Forest and Bird had sought, that mitigation considerations should in themselves be given a greater weighting than offsets. Rather, it held that the weighting depended on the context, including the degree of mitigation and the scale and qualities of the offset.[7]

[7] We note the agreement of the parties and the High Court that since s104(1)(a) allows the taking into account of positive effects on the environment proffered by the applicant, offsets can be had regard to when exercising the discretion under s104, and in appropriate contexts under s5(2).[8] We are instructed that they do not constitute "mitigation" in terms of s5(2)(c).[9]

[8] Had we been dealing with a non-complying activity, this would clearly have been important, since, not being mitigation, offsets could not be brought to bear on the assessment of the level of adverse effect under the first "threshold test" for jurisdiction in s104D. However, in the case of discretionary activities there is no statutory threshold guarding the entrance to s104. Under s104 it is trite to say that what is required is a broad overall consideration of the scale and character of the effects, positive and adverse, together with the provisions of the statutory instruments and ultimately the application to them of relevant aspects of Part 2. Whether adverse effects are reduced by mitigation or counterbalanced by "offsets" or positive effects may not of itself be material in the overall outcome.

[9] In dealing with the issues before us, Forest and Bird addressed itself to s104(1)(b) to a much greater extent than s104(1)(a). It noted that a number of the policies of relevant policy statements and plans were couched in the form "*to avoid,*



[7] CIV-2013-409-789 [2013] NZHC 1324, paragraph [123]
[8] CIV-2013-409-789 [2013] NZHC 1324, paragraphs [15] and [55]
[9] CIV-2013-409-789 [2013] NZHC 1324, paragraph [62]

remedy or mitigate any adverse effects on/from..." and submitted that since the proposed offset was considered a form of mitigation, it may have been given a greater weight than was warranted in the evaluation of the statutory instruments. It submitted that such a re-evaluation would lead to the conclusion that there was a level of inconsistency between the proposal and the plans, rather than the neutrality we found in our interim decision.[10]

[10] Forest and Bird relied for this submission on the concluding paragraph of our discussion of the relevant regional policy statement and regional and district plans in the interim decision:

> [307] For the reasons we have given we hold that the proposal is somewhat inconsistent with, rather than contrary to, the provisions on wetlands, significant indigenous flora and significant habitats of indigenous fauna to which Mr Purves referred. But there are provisions of considerable significance to this case. We accept that provisions which enable mining and encourage the types of mitigation/offsetting proposed pull in the opposite direction. Overall we find that the provisions of the plans are evenly balanced with respect to the proposal, rather than consistent.

[11] The paragraph cited is a finding drawing on an examination of a wide range of policy and planning documents. It is clear to us that there are some provisions which support mitigation of adverse effects, and others which authorise us to take account of offsets. So, strictly speaking we consider the paragraph to be accurate, but with the benefit of hindsight it might have been better to use the words "mitigation" and "offsets" than to run them together in somewhat shorthand form. So, acknowledging the earnestly advanced arguments of both parties, we examine again the relevant parts of our decision to test whether we imported the concept of offsets into our analysis of policies which focus on mitigation.

[12] In our discussion of specific provisions relating to mineral extraction[11] we referred to the twin objectives of the Buller District Plan:

> ... to enable people and communities to provide for their economic and social well-being through the efficient utilisation and development of natural resources; and

[10] Forest and Bird, submissions 12 June 2013, paragraphs [79] – [81]
[11] [2013] NZEnvC 047, paragraphs [255] – [260]

> to safeguard the life supporting capacity of air, water, soil and eco-systems and avoid, remedy or mitigate adverse effects from the use and development of mineral resources.

[13] BCL submits that the decision did not discuss offsets in its consideration of these objectives, the policies which flow from them, and the relevant objective and policy of the regional policy statement.[12] That is so. We were concerned at that point to make clear that neither one of these two policies had precedence over the other; and while they raised competing considerations, an overall broad judgement was required which kept both of them fully in mind.[13] We see no reason to change that view.

[14] The decision then turned to objectives and policies concerning the effects of land-based activities on water quality and quantity. Where these policies touched upon wetlands, significant indigenous vegetation, or significant habitats of indigenous fauna, we deferred discussion of those elements of the policies to sections of the decision specifically directed to those topics.[14] In that section of the decision we discussed the treatment of water before discharge from the mine site and effects on receiving waters, and the length and qualities of the re-constituted streams on the mine site. All these matters remain, in our view, direct mitigation.

[15] In terms of wetlands, the West Coast Regional Policy Statement contains a policy setting out matters to be considered in deciding whether development in a wetland is inappropriate.[15] These include:

> (f) the extent to which any development provides a benefit.

[16] Having regard to this policy, we should take into account "offset" benefits that an applicant volunteers by way of condition, as well as benefits that accrue from the activity applied for. We note that, because of some effects neither mitigated (as some of the policies to which we referred require) nor offset, we found "quite some tension" between the proposal and some relevant wetland objectives and policies.[16] We do not consider that in that section of the decision we conflated "mitigation" and "offsets". If inadvertently we created that impression, we indicate that an express

[12] BCL submissions 4 July 2013, Appendix 1, paragraphs [4], [5]
[13] [2013] NZEnvC 047, paragraph [260]
[14] [2013] NZEnvC 045, paragraph [265]
[15] WCRPS Policy 9.1
[16] [2013] NZEnvC 047, paragraph [280]

separation of the concepts would not produce a different conclusion. Each has been separately weighed and factored into our deliberations as to the ultimate outcome.

[17] The interim decision also had full regard, in the context of the proposal, to the various objectives and policies relating to significant indigenous vegetation and significant habitats of indigenous fauna.[17] BCL notes that specific discussion of the DPPA and DBEA occurs in association with a regional policy to promote the containment and reduction of noxious and potentially noxious weeds and pests.[18] That is strictly accurate. But we also set out in that section of our decision, policies from the Regional Policy Statement and the Regional Land and Water Plan which are couched in terms of avoiding, remedying or mitigating adverse effects. Given that we approached the term "offset" in the same manner as the Board of Inquiry in the Transmission Gully proposed plan change, it might have appeared that we approached those policies with some thoughts of the DBEA and DPPA in our minds. We now therefore consider those objectives and policies again, keeping clearly before us the distinction between offsets and mitigation made by the High Court.

[18] In assessing the significance of this for the overall decision, we recall that those policies calling for avoidance, remedy or mitigation represent a minority of the policies relating to significant indigenous vegetation and significant habitats of indigenous fauna, and that we had, in any case, found the proposal "*somewhat inconsistent*" with the suites of policies around these subjects. Keeping the concepts of "mitigation" and "offsets" completely separate, we consider that conclusion would not be affected in any material way. Viewing that minimal change in the much wider context of all the relevant objectives and policies of the statutory documents, we find those documents broadly equivocal to the proposal in the literal sense of that word.

[19] On careful reflection, applying strictly the distinction in terminology set out by the High Court, we find, as the High Court envisaged possible, that our interim judgment that with appropriate conditions consent can be achieved, is not materially affected.

[17] [2013] NZEnvC 047, paragraphs [284]-[288]
[18] BCL submissions, Appendix 1, paragraph [20]

The condition relating to the DPPA

[20] In our interim decision we recorded an offer by BCL to set aside a contiguous area of approximately 745 hectares to contain specified minimum areas of sandstone pavement, pakihi wetland scrub and forest. BCL proposed a condition which would require it to use "reasonable endeavours" to establish a legal mechanism to protect this area, referred to as the Denniston Permanent Protection Area ("**DPPA**"), from open cast mining, and in the event it was unsuccessful, to provide alternative offsets in the Heaphy Biodiversity Enhancement Area ("**HBEA**").[19]

[21] We expressed two concerns about the condition in that form. First, we were concerned that the protection was offered only against open cast mining in circumstances where the stated purpose of the DPPA was to provide the best possible conditions for native eco-systems and native flora and fauna to flourish. We considered that that aim could be frustrated by a greater range of activities than simply open cast mining.[20] Secondly, we had no real evidence that BCL's "best endeavours" would result in the additional legal protection required, given that it did not own the land proposed for such protection.[21]

[22] The questions of the lawfulness of the proposed conditions relating to the DPPA and (if they are lawful) of the weight to be attached to them remain strongly debated by the parties. Since they are of considerable significance, we set out in full the conditions now put forward by BCL.

> **Specific objectives and goal of the DPPA**
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> 141. The goal of the Denniston Biodiversity Enhancement Programme shall be to achieve and sustain improvements in key biodiversity attributes within the DPPA ~~as outlined in Condition 138a)i).~~.
>
> 142. The objectives of the Denniston Biodiversity Enhancement Programme in the DPPA are to:
>
> a) Offset the residual adverse effects on biodiversity values from the EMP;
>
> b) To achieve statistically significant improvements in abundance and to ensure that those improvements are sustained for each of the following key measurable and representative biodiversity attributes:
>
> i) Great Spotted Kiwi;

[19] [2013] NZEnvC 047, paragraphs [238]-[243]
[20] [2013] NZEnvC 047, paragraph [249]
[21] [2013] NZEnvC 047, paragraph [349]

ii) *P. Patrickensis;*

iii) South Island fernbird;

iv) Rifleman;

v) Forest gecko; and

vi) West Coast green gecko.

Legal protection of the DPPA and future applications

143. Prior to undertaking any Mining Operations under this consent, the Consent Holder shall:

a) In consultation with the Ministry of Business, Innovation and Employment – NZ Petroleum & Minerals and the Department of Conservation, use best endeavours to establish a legal mechanism to protect the DPPA from future Open Cast Mining; and

b) Upon either:

i) the legal mechanism being established; or

ii) the best endeavours discussions being exhausted,

the Consent Holder shall provide evidence of the legal mechanism or an outline of the best endeavours discussions (as might apply) to the Buller District Council.

For the purposes of this condition, "Open Cast Mining" shall mean the removal and/or placement of overburden including soil and/or subsoil layers for the purpose of gaining access to minerals below the removed overburden for the extraction of those minerals.

144. From the commencement date of these consents, the Consent Holder shall:

a) inform the relevant consent authority of the presence of the DBEA and DPPA as part of any new application for resource consents to undertake mining within the DBEA; and

b) make no application for Open Cast Mining (as that term is defined in 141) within the area covered by the DPPA.

Advisory note:

- condition 142a) is proffered condition to require the Consent Holder to advise any future decision maker of the existence of the DBEA and DPPA when considering any new application for resource consents. It does not bind or fetter the discretion of a future decision maker in considering any future application for resource consent.
- Condition **142**b) is a proffered condition intended to further protect the DPPA. It is in addition to the legal protection that is to be sought under condition **141.**

[23] In support of its proposition that the proposed condition 141 is unlawful, Forest and Bird cited the decision of the High Court in ***Director-General of Conservation v Marlborough District Council***:[22]

[22] [2004] 3 NZLR 127 at paragraph [136]

> It is of the essence of a judicial function that the adjudicator will be required to make findings of fact. If the function of making a finding on facts which are essential to the decision is delegated then there is a delegation of judicial function. That may occur in circumstances where the delegate is not explicitly deciding a dispute between the parties. The role of the delegate as certifier may conceal the fact that what is being delegated is the power to certify a matter which is an essential element of the decision which shall be made by the tribunal.

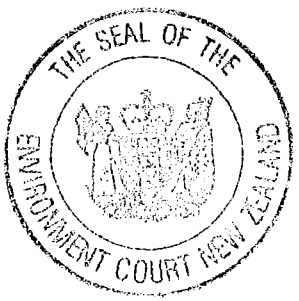
[24] Forest and Bird submits on this basis:[23]

> Rather than the Court deciding whether there is additional protection for the DPPA, the question turns on whether BCL considers it has exhausted best endeavours to obtain such protection. The Court does not get the ultimate say on whether the protection offered to the DPPA is sufficient to support a grant of consent... Given the importance of the DPPA, the judicial function of determining whether additional protection of the DPPA is sufficiently assured should not be delegated...

[25] Forest and Bird further submits that even if the condition were lawful, it should not be given any weight. The condition is substantially little different from that proposed by BCL at the hearing in late 2012, when the Court had evidence before it that negotiations on the part of BCL with the Department of Conservation and the Ministry of Business, Innovation and Employment were likely to be protracted and uncertain.[24]

[26] Finally, Forest and Bird contends that the activities against whose effects the DPPA is to be protected are too narrowly defined. It contends that if only the activities contained in the definition of open cast mining are precluded, a range of land disturbance activities detrimental to the eco-system and significant indigenous flora and fauna of the DPPA could still occur. Such activities could in its view include:

- dumping of overburden from mining operations on neighbouring land;
- construction of infrastructure to support mining activity;
- construction of haul roads.[25]



[23] Forest and Bird submissions, 12 June 2013, paragraphs [23] and [25]
[24] Forest and Bird submissions, 12 June 2013, paragraphs [26] and [27]
[25] Forest and Bird submissions, 12 June 2013, paragraph [35]

[27] BCL submits that its proposed conditions can be distinguished from those described in ***Director-General of Conservation*** above. In that case the High Court considered the validity of a proposed condition that a future survey must satisfy the consent authority that the site of a proposed marine farm would not be of "special significance" to Hector's Dolphin. In other words, the Court appeared to be delegating to a consent authority the exercise of judgment over a matter which was essential to the decision[26]. In the case of the presently proposed condition 143, BCL submits that the consent authority has in contrast the usual [certification] function concerning the operation of most conditions, on this occasion it being to determine whether BCL's obligations to use "best endeavours" have been extinguished.[27] It submits that if BCL can be shown to have met the best endeavours requirement but fails to establish a legal mechanism to protect the DPPA prior to undertaking mining operations, it may be permitted to proceed with the latter. It says that the condition is distinguishable from the *ultra vires* conditions in the ***Director-General*** decision, as here there is no future decision which could frustrate the operation of the consent. We infer that BCL is submitting that condition 143 involves simply a certification function, a common and lawful approach under conditions of consent.

[28] In terms of the weight to be attached to the DPPA proposal and the conditions relating to it, BCL submitted that the situation had changed between the time the Court framed its interim decision and the present hearing. It acknowledged that when the Court completed its hearing in 2012 it had no evidence by which to judge how successful those endeavours would be;[28] now, however, negotiations between relevant ministers and the company had begun, and offered a realistic prospect of a beneficial outcome.

[29] Mr H Bohannan, the chief executive of Bathurst Resources Limited, described discussions which had occurred between a number of groups with a view to achieving an agreed strategy with designated areas on the Denniston Plateau to be permanently set aside from mining, and areas which would be available for it. The parties involved include the Department of Conservation and the Ministry of

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[26] In its subsequent decision C113/2004, the Environment Court explained that it had made inconsistent findings in its first decision, and proceeded to make it clear that in now recommending consent, it was doing so on the basis of clear information as to lack of potential significant adverse effects on Hectors Dolphin, and that if in future evidence emerged to the contrary, the consent could be made the subject of review under s128 RMA, and possibly even cancelled under s132(4).

[27] BCL submissions 4 July 2013, paragraph [56]

[28] Transcript 12 June 2013, p 37

Business, Innovation and Employment, BCL, Solid Energy Limited, Te Runanga o Ngati Waewae, the New Zealand Historic Places Trust and the Royal Forest and Bird Protection Society.[29] While the details of such discussions are confidential, Mr Bohannan did feel able to tell us that the scope of discussions was much broader than simply the protection of an area (the DPPA) as an offset for the adverse environmental effects of the Escarpment Mine Project.[30]

[30] Mr Bohannan indicated that the Ministry of Conservation's preference was for one legislative process to create a legal reserve in connection with the entirety of the Brunner Coal measures rather than to have a separate legislative process for the DPPA.[31] He added that if the point is reached where BCL seeks to begin mining operations and no agreement has been reached as to the wider reserve, the company will request the relevant ministers to initiate legislation to protect the DPPA.[32]

[31] Mr Bohannan attached to his evidence a copy of a letter written to the Court by the Minister of Conservation concerning the co-ordination of conditions in relation to the access arrangements BCL require and resource conditions.[33] The letter contains the following paragraph, apparently written with the concurrence of the Minister of Energy and Resources:

> In relation to Buller Coal's proposal for an area of land to be permanently set aside on the Denniston Plateau from mining, I support interested parties meeting to discuss this, and I understand a meeting has been scheduled. I and my colleague the Minister of Energy and Resources are supportive of a proposal that a reserve be created on the Denniston Plateau and that it be included in the Fourth Schedule of the Crown Minerals Act 1991 if it merits that form of protection.

[32] Mr Bohannan's evidence is, and BCL submits, that in view of the progress made, and the undertaking given on BCL's behalf not to seek consent to mine in the DPPA area, there is no necessity for a legislative mechanism to be in place prior to the consent commencing.[34] It adds that the access agreement given by the landowners precludes them granting access to another party to mine the DPPA area prior to a

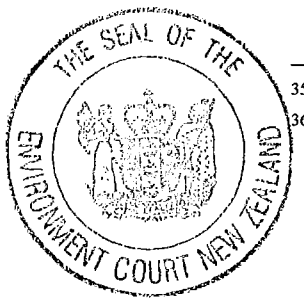
[29] H Bohannan, Supplementary Statement, paragraph [12]
[30] H Bohannan, Supplementary Statement, paragraphs [13]-[14]
[31] H Bohannan, Supplementary Statement, paragraph [17]
[32] H Bohannan, Supplementary Statement, paragraph [19]
[33] H Bohannan, Supplementary Statement, Annexure A
[34] H Bohannan, Supplementary Statement, paragraph [20]; BCL submissions 12 June 2013, paragraph [645]

comprehensive plan to protect areas of Denniston becoming the subject of legislation.[35]

[33] As to what the area set aside should be protected from, BCL relies on and continues to propose the definition of open cast mining set out in condition 143. Beyond that, it suggests that the legislative process (which is of course beyond the ambit of the present proceeding), may or may not choose to go further. However it quite reasonably indicates that it does not consider that it can achieve complete prohibition of all land disturbances within the protected area in perpetuity.[36] We consider that there is an appropriate half way house that would serve the purpose of the Act, namely that the threat of environmental damage within the DPPA from activities beyond the definition of open cast mining, could (and in our view must) be substantially reduced by the addition of the words "and the infrastructure or associated land disturbing activities that support it."

[34] We accept that BCL is committed to achieving a comprehensive approach to mining and ecological protection on the Denniston Plateau, and that this commitment is shared by the current Ministers of Conservation and Energy and Resources. We also acknowledge that for a non-party minister to write to the Court on behalf of himself and a colleague is notable, if not, as BCL suggests, unprecedented. But the condition in its current form still presents the Court with difficulties.

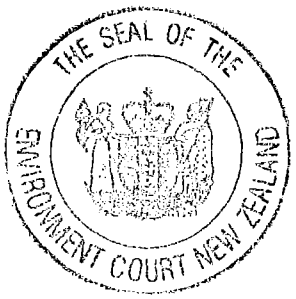
[35] We currently do not know the extent of the area to be set aside for protection that the ministers have in mind, nor what eco-systems it would contain. An indication that the final extent would be no less than the proposed DPPA, and confirmation of the current state of knowledge about its habitat characteristics, would assist. We do not know the proposed time-frame for getting legislation to Parliament, even whether it is intended in the lifetime of the current Parliament. Nor do we know the form of protection to be afforded. We have identified specific and serious adverse effects which require to be offset if consent is to be appropriate. The Court is being asked to accept unspecified benefits, or at least benefits unable to be guaranteed, as "offsets." BCL is effectively saying "*trust us and those we are negotiating with to do the right thing.*" We have no reason to doubt the goodwill of any party to the negotiations. Equally we have at the moment no way of foreseeing the outcome.



[35] BCL submissions 12 June 2013, paragraph [649]
[36] BCL submissions 12 June 2013, paragraphs [64]-[68]

[36] We have put some effort into considering possible ways forward in this situation. For instance, as a first option, the Court could issue a further interim decision, and wait to see what further protection can be achieved for the DPPA before finalising consent. A second option might be to strengthen conditions to ensure that best endeavours would have been genuinely exhausted prior to the consent commencing, by requiring that fact to be certified by a party other than the consent holder. The most logical certifiers would be the two councils whose consents are in issue. If the latter course were to be pursued, one way in which certainty and finality could be achieved, might be to allow recourse to this Court, perhaps by way of the mechanism of an application for declaratory judgment, if the councils and BCL found themselves unable to agree. We tentatively favour the second option for reasons recorded in the next paragraph concerning legislative processes. However, because of the unusual nature of such a step, the parties have leave to discuss this aspect further and provide prompt input, hopefully agreed, within 10 working days of the date of this decision.

[37] In recording this tentative preference we remind ourselves that our overall decision has been one to grant consents for mining. We take into account as well that neither legislative consenting process should be seen to control, let alone trump, the other. Also, that the parties that BCL is negotiating with are, after all, the keepers of the "conservation estate" (loosely-described) on behalf of the NZ Government. We expressly record that we are not doubting that BCL or any of the other parties would be genuine in their endeavours, but we are aware of the conflicting demands of industry wishing to go about its business as quickly as possible, and the time which legislative processes can consume. We can at least hold that in such circumstances BCL would not be "issuing itself a certificate", and we could expect the councils properly to oversee the operation of conditions of consent. (Adequate policing of conditions of consent was a matter on which we tested the councils before this last hearing when they exhibited reluctance to continue to participate through counsel in the later stages of the hearing process. They satisfactorily answered our concerns by preparing and lodging affidavits by their respective CEOs, explaining precisely how they would meet their obligations of monitoring and enforcement.)



Management plans

[38] The conditions as proposed provide for the preparation and certification of five management plans prior to the undertaking of the activities the consents authorise. These include:

- an ecology and heritage management plan;
- a mine operations management plan;
- a coal processing plant operations management plan;
- a social impact management plan;
- a Denniston and Heaphy Biodiversity management plan.

It is clear to us that at least the first three of these will be lengthy and complex documents. The ecology and heritage management plan for instance requires separate sections related to management of the greater spotted kiwi, *Powelliphanta patrickensis*, lizards, other fauna, weed and animal pest management, historic heritage management, and mine site rehabilitation management.

[39] In relation to that plan, (which is of high concern to the appellants), the conditions set out a series of objectives the various sections of the plan are to contain, a series of matters the sections are to deal with, and finally a requirement for an appropriately qualified expert to be appointed to oversee and report on all inputs into the management plan. As an alternative to the last of these requirements, in the case of some sections of the plan the consent holder is required to report on the monitoring it has undertaken, and the effectiveness of the implementation of the relevant sections of the plan.

[40] Forest and Bird submit that the combination of broad objectives and a list of areas to be addressed, rather than specified targets to be met, take the role of the certifier beyond mere certification into the role of fact finding on matters essential to the decision to grant consent – something no judicial tribunal can delegate.

[41] We consider that submission in the light of our interim decision. That decision did not shrink from the fact that consent would involve a series of significant temporary or permanent adverse ecological effects, including effects on matters we are required to recognise and provide for in terms of s6 of the Act. We referred to (amongst others):

- The potential loss of 10% of the biodiversity of the Denniston Plateau [86];[37]
- The loss of 19.8 hectares of sandstone pavement and associated ecosystems; [132]
- The loss of seepages from the mine site; [143]
- The loss of southern rata, pink pine and mountain beech from the site for centuries; [152]
- Effects on the terrestrial invertebrate community such that what will exist on the mine-site will bear little resemblance to the present situation; [154]
- Effects on the aquatic invertebrate community such that the type and time-frame of its recover are impossible to predict; [174]
- The retention of only 40% of snail habitat on the site, and that, fragmented; [166] and [169]
- The potential loss of all snails from the mine site; [171]
- The loss of lizard habitat in all areas not subject to VDT; [186]
- A major reduction in the abundance of lizards on site; [185]
- Loss of rifleman habitat for up to a century; [189]
- A reduction in the habitat of large forest birds, including kiwi; [189]

[37] The numbers in square brackets refer to the relevant paragraph of our interim decision [2013] NZEnvC 127

- Mortality amongst bird populations forced to relocate, including kiwi, weka, robin, tomtit and fernbird; [191]

- The likely loss of rare plant specimens of *Euphrasia wettsteiniana*; *Sticherus tener* and *Peraxilla tetrapetala* [327].

Despite all those important adverse effects, we held that the scheme of the Act was such that, having evaluated all the other relevant matters, consent ought to be granted, albeit that it was finely balanced.

[42] Nevertheless, it cannot be disputed that as far as is possible, compatible with an exercisable consent, any such adverse effects should be kept to the minimum. Significant vegetation and significant habitat should not be lost where it can reasonably be saved.

[43] Our interim decision also made clear that knowledge of the eco-systems on the Denniston Plateau is incomplete, and has in fact increased as the parties have undertaken research to support their various cases. We consider that the process of undertaking the various rehabilitation measures we have found necessary will further advance understanding of the eco-systems of the plateau. In such circumstances, the conditions dealing with the management of what all parties recognise as important eco-systems need to be flexible enough to allow the best possible environmental outcome to be achieved in the light of advancing knowledge and experience. What a management plan certifier is being asked to do is to confirm that the management plan concerned is the most appropriate means available at any given time to achieve the objectives stated in the conditions.

[44] We note that where it is appropriate to be specific, as in the case of the structure of the ELF and the low permeability layer ("**LPL**"), these matters are now stated as a condition of consent.[38] The role of the relevant section of the management plan[39] is simply to provide the details of how the requirements will be met. Any modification of the plan is to be based on monitoring the performance of the LPL and the ELF.

[38] Condition 267
[39] Described in Condition 80

[45] With respect to the ecological and rehabilitation-related management plans, we acknowledge that these contain less certainty in some areas at this stage. On the one hand it could be said that more detail could have been provided by BCL, but we have decided that the extent of the drafting undertaken at this stage is adequate because the requirements for these management plans must be read in conjunction with the hold points and controls embedded in other conditions. These include requirements around mine scheduling and the recovery of flora and fauna, all of which are critical to the final success of rehabilitation.

[46] We therefore find that the conditions containing provision for management plans do not unlawfully delegate the Court's decision-making function. In fact, what is proposed in this case appears to us in accordance with what the Environment Court held in ***Wood v West Coast Regional Council***:[40]

> In ***New Zealand Rail v Marlborough District Council*** (1993) 2 NZRMA 449, this Court took the view that if an applicant was relying on a management plan as a method of avoiding, remedying or mitigating adverse effects, that plan should be formulated so it could be scrutinised by the Court, and if accepted, included as part of the conditions of consent. That may still be the appropriate way to proceed in some circumstances. However, in this case it was pointed out that practical difficulties can arise, particularly where a management plan might benefit from future amendments to keep pace with developments in technology.

[47] If the word "science" is substituted for the word technology, the final sentence cited is a precise description of the situation in this case.

Decision

[48] The parties have largely come to agreement about the <u>form</u> of conditions (the appellants of course having remained opposed to the grant of consent for the reasons outlined at the latest hearing). As a result, the conditions are now in considerably better shape than they were at the time of the main hearing late last year. We hold that they are almost suitable for us to consider signing off the consents, subject to our directions in paragraphs [36] and [37] above, and the following.

[49] In section 1.4 a new condition is required which provides that in the event of early closure of the mine, the consent holder is to review the closure plan (Condition

[40] C127/99 at paragraph [6]

1.9.1.1) and confirm to the relevant Councils that all closure and rehabilitation requirements can and will be met.

[50] Condition 30 (section 1.7) shall provide that the Environmental Manager shall also be accountable for the following:

(a) In addition to the preparation and review of management plans, the implementation of the plans along with the implementation of the conditions of consent (including all monitoring and reporting);

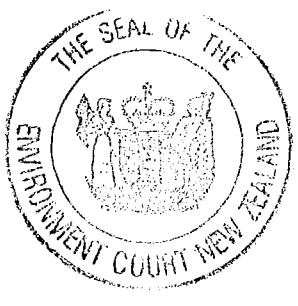
(b) Coordination of the salvage and relocation of fauna and flora ahead of any land-disturbing-activities including construction works, to maximise the effectiveness of eventual rehabilitation outcomes.

[51] Condition 30 is also to be expanded to provide for the consent holder to employ an Environmental Manager at all times during the mining operations and the subsequent rehabilitative stages.

[52] In Section 2.2, Condition 178(a), the reference to VDT and VIT methods being favoured over planting, must be expanded to require as well that as between VDT and VIT, the former is to be favoured over the latter.

[53] Provision is also to be made within condition 62(g) for the recovery and transfer of rare flora, in line with condition 178. Modification of condition 62(a)(iii) should also seek to optimise rather than constrain rehabilitation.

[54] A condition is to be added to section 1.8 (Management Plans) that provides for implementation of all plans. In addition, appropriate conditions are required that require a feedback loop from monitoring and reporting of each plan and which provide for review, evolution and amendment of all or any plans in the event that they do not prove as effective as anticipated. This should be in addition to any review requirements to enable timely changes to be made and requires certification for any material changes from the appropriate Council. The sole purpose of this condition is to enhance environmental performance, not to reduce it, so an Advice Note is to be included to that effect.



[55] As part of the rehabilitation requirements in condition 62, a record of the mode of rehabilitation is to be kept and reported to the Councils to provide an audit trail and cross-check on consent holder performance. Reporting is to be of sufficient frequency to enable corrective action to be taken before rehabilitation outcomes are compromised.

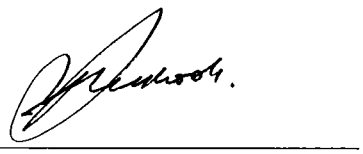
[56] In Condition 178(b), it is to be provided that in the event of a dispute between the Environmental Manager and any manager in charge of mining operations, the former is to prevail, such that protection of flora, fauna, eco-systems and habitats is to take precedence. (In line with Mr Bohannan's assurance to the Court that this is not hard to achieve). This should also extend the definition of "hold point" which currently provides that the General Manager may, as an alternative to the Environmental Manager, certify certain requirements to be complete.

[57] In paragraph [33] of this decision we have referred to a need to somewhat expand the extent of controls in the DPPA beyond just open cast mining. We recognise that this is a proffered condition, but we have acknowledged the submission made by the appellants by holding that it is important to the question of whether consent should be granted that the controls be bolstered as described in that paragraph. BCL is invited to include the expanded version in that which it proffers.

[58] The legal protection of the DPPA or failing that the issue of certification of best endeavours described in our paragraph [36] above (either of which is to occur before the consent can be exercised) requires further consideration and drafting as already discussed. If our tentatively suggested route is to be confirmed, the dispute resolution aspect of it might best be contained in an Advice Note.

SIGNED at AUCKLAND this 7th day of August 2013

For the Court:



LJ Newhook

Acting Principal Environment Judge