

## Appendix Eight – case law on expert analysis vs lay submitter opinion

### Overview of legal position

1. It is Westpower's understanding that there is no judicial guidance on the weight to be afforded to lay submitter evidence and expert evidence specifically under the Conservation Act 1987 (**Act**). However, principles of evidence are synonymous throughout New Zealand's different jurisdictions such that the well-established principles concerning evidence under the Resource Management Act 1991 (**RMA**) are applicable to the concession process under the Act.
2. It is well-established under RMA case law that findings of fact must be based on material of probative worth, not on mere assertion, suspicion, or speculation.<sup>1</sup> Opinions expressed must have a factual basis, must not be speculative, but rather be reasoned and sound to be relied upon.<sup>2</sup>
3. In the recent Environment Court decision *Blueskin Energy Ltd v Dunedin City Council* [2017] NZEnvC 150 at [158] the Environment Court set out the accepted approach to landscape assessment.

*"When considering amenity values, in particular, our usual approach is to start with the residents' views. We regard their views on their existing amenity as subjective as they may be influenced by personal feelings or opinions, including the strength of their attachment to this place. Second, we look to what the District Plans have to say about the area's amenity values; subject to any submissions or appeals on a proposed plan, the court is usually able to regard this as an objective record. Third, having ascertained the values we would expect them to be objectively tested by landscape experts who will advise whether the basis for those values are reasonably held and then assess whether the proposal gives rise to landscape and visual effects. If it does, the next step is to consider whether there are any consequential effects on the existing amenity values. Finally, we would assess the landscape and visual effects and the effects on amenity values in light of the outcomes for the relevant resources and values under the District Plans. We note that a similar approach was taken in *Scholfield v Auckland Council* ([2012] NZEnvC 68 at [42] and [51]) and *Port Gore Marine Farms v Marlborough District Council* ([2012] NZEnvC 72 at [213]-[217])."*<sup>3</sup>

4. Lay submitter evidence is viewed as being subjective whereas expert evidence is objective and therefore to be afforded greater weight when assessing potential effects on landscape and natural character.
5. That is not to say that submissions are not relevant, but care must be afforded to lay submitter opinions. While submitters can express contrary views and they must be considered, real care is needed to give appropriate consideration and weight to those expert views on matters such as natural character which are routinely the subject of expert evidence.
6. The well-accepted principles of evidence should apply in the context of considering Westpower's Waitaha project concession application unless there is a justifiable explanation of why that is not the case.

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<sup>1</sup> *ECNZ Ltd v Manawatu-Wanganui RC* W070/90 (PT).

<sup>2</sup> *Re Meridian Energy Ltd* [2013] NZEnvC 59.

<sup>3</sup> *Blueskin Energy Ltd v Dunedin City Council* [2017] NZEnvC 150 at [158].

7. Given the skills, experience and knowledge of experts, it is essential that the decision-makers in the Waitaha project afford greater weight to the views of experts when assessing the Waitaha concession application, otherwise the decision-makers must provide robust and thorough reasoning for why lay submitter opinions are to be afforded greater weight than expert evidence.