

MOTUROA/RABBIT ISLAND BIOSOLIDS CONSENT APPLICATION**RM200638** Discharge Biosolids to Land (replacing NN940379V3)**RM200639** Discharge Odour to Air**RM200640** Land Use to Operate and Maintain the BAF**RM200641** Discharge Stormwater and Washdown Water to Land**CASE BUNDLE**

No.	Case	Citation
1	<i>Tainui Hapu v Waikato Regional Council</i>	RMA305/99, 10 May 2004
2	<i>Auckland Volcanic Cones Society v Transit NZ</i>	[2003] NZRMA 316
3	<i>Medical Officer of Health v Canterbury Regional Council</i>	W109/94 (PT) 15 November 1994
4	<i>Horowhenua District Council v Manawatu-Wanganui Regional Council</i>	[2018] NZEnvC 163
5	<i>PVL Proteins Ltd v Auckland RC</i>	A061/01 (EnvC)
6	<i>Te Rangatiranga o Ngati Rangitahi Inc v Bay of Plenty Regional Council</i>	[2010] 16 ELRNZ 312
7	<i>Crest Energy Kaipara Ltd v Northland Regional Council</i>	[2011] NZEnvC 26
Council Resource consents		Location/Region
8	CRC164414	Canterbury
9	CRC174198	Canterbury
10	CRC141274	Canterbury
11	APP-20211372 and	Southland
12	AUTH-20211372	

ORIGINAL

Decision No. A063/2004

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of an appeal under section 120 of the Act

BETWEEN TAINUI HAPU and others

(RMA305/99)

Appellants

AND

THE WAIKATO REGIONAL
COUNCIL

Respondent

AND

THE WAIKATO DISTRICT COUNCIL

Applicant

BEFORE THE ENVIRONMENT COURT

Alternate Environment Judge D F G Sheppard (presiding)

Environment Commissioner P A Catchpole

Environment Commissioner R M Dunlop

HEARING at **Hamilton** on 23, 24, 25, 26 and 27 February, and 1 and 2 March 2004.

APPEARANCES

A N Greensill for the appellants

J Milne for the respondent

S Brownhill and N D Wright for the applicant

R M Gregory for Nga Uri o Ngahue/Te Kupenga Maori Incorporation (under section 274 of the Act).



DECISION

Introduction

[1] The main issue in this appeal is whether a coastal discharge permit for disposal of the effluent from the Raglan sewage treatment plant should be for 15 years (as granted) or for 5 years (as the appellants sought).

[2] The appellants, Tainui Hapu and associated tangata whenua groups, maintained that a 5-year term would suffice for the Waikato District Council to discharge the effluent to land instead of to the Raglan Harbour, which they find culturally objectionable. The District Council responded that it had not been able to identify a feasible alternative to discharging effluent to the harbour, and that the effluent would be treated to shellfish-gathering quality, and (in deference to Maori sensitivities) would be passed through a wetland prior to discharge.

[3] The appellants replied that the District Council proposed to discharge the effluent to the harbour not through lack of a feasible affordable alternative, but due to a lack of commitment to comprehensively investigate an option that would be less offensive to the tangata whenua.

[4] Another issue was raised by a separate group that was heard under section 274 of the Act in support of the appellants. Nga Uri o Ngahue/Te Kupenga Maori Incorporation (Nga Uri) challenged the jurisdiction of the Court to decide the appeal, claiming that it is a matter of title to the seabed and foreshore.

The appeal

[5] We start by describing the process leading to Tainui Hapu's appeal.

Resource-consent applications and primary decision

[6] The Waikato District Council applied to the Waikato Regional Council for resource consents required for a proposed upgrade of the existing wastewater treatment plant at Raglan. Relevantly, the consents sought included a coastal permit for discharge of treated effluent to the Raglan Harbour (Whaingaroa).



[7] The appellants and others lodged submissions in opposition to the resource consents. A committee of the Regional Council and an independent Commissioner appointed by the Regional Council heard the applications and submissions in opposition. By a majority (one member of the committee dissenting) the committee granted the consents sought, including consent to discharge up to 3,400 cubic metres per day of treated wastewater into the Raglan Harbour mouth for effluent disposal purposes.

[8] The committee imposed an elaborate suite of conditions on the discharge. The conditions included—

- A requirement to undertake treatment and disposal of wastewater in accordance with a management plan to be approved by the Regional Council.
- Limits for concentrations of suspended solids, BOD₅, and faecal coliforms in the discharge.
- A stipulation that treated wastewater is only to be discharged on ebb tides.
- Monitoring of quality, quantity, and variability of discharge and of effluent dispersion.
- Maintenance of a flow meter and records of discharge times and volumes.
- Provision of an analysis of environmental hazards and contingency plans associated with potential discharges of wastewater.
- Keeping a complaints register.
- Provision for review of the conditions.

Appeals

[9] Five appeals against the decision were lodged with the Environment Court. Of them, three were withdrawn or struck out. An appeal by the District Council seeking modifications to certain conditions was settled, with the parties seeking a consent order.



[10] The appeal by Tainui Hapu and others remained for contested hearing, and is the subject of this decision. By their notice of appeal they sought that the Court decline the applications. Their grounds of appeal were summarised in this conclusion:

While there is no doubt that more ponds and treatment will improve the wastewater quality, the fact that the final product will continue to be discharged for 15 more years across ancestral Maori land into the harbour while alternatives have not been fully investigated can no longer be justified.

[11] As already indicated, at the start of the appeal hearing the appellants announced that they no longer sought that the consents be declined, but sought that the term be limited to five years.

[12] Nga Uri continued to seek that the consents be declined.

The Court's jurisdiction

[13] The submissions presented to the Court by Mr Gregory on behalf of Nga Uri were not entirely clear in all respects. Even so, Nga Uri are entitled to the Court's decision on what we understood to be an important part of its case. The substance appeared to be this:

- (a) That Nga Uri are sovereign by birth and whakapapa (citing the Declaration of Independence 1835, the Treaty of Waitangi 1840, Te Ture Whenua Maori Act 1993, the Imperial Laws Application Act 1988, and other instruments that we were not able to identify¹):
- (b) That the Councils do not own the foreshore and seabed, and are not entitled to make decisions to pollute the moana:
- (c) That Nga Uri challenged the jurisdiction of the Court, saying "the Judge cannot rule in this case, it's a matter of title".



¹ The instruments cited that we have not been able to identify were the Districts Regulations Act 1858; the Native Land Courts Act 1894; Te Ture Whenua Maori Incorporations Constitution Act 1995; "Special Resolutions 2004 (reg 4(2)/94-95 Common Law"; and the "Universal Commercial Code (UCC)".

[14] The District Council submitted that the Environment Court's role is to determine matters under the Resource Management Act 1991, not to rule on constitutional issues. It cited the Environment Court decisions in *Te Ohu o Nga Taonga Ngati Manu v Stratford District Council*² and *Hauraki Maori Trust Board v Waikato Regional Council*.³ The District Council also submitted that ownership of foreshore and seabed is not relevant, as the right to resource consent under the Act is not predicated on land ownership.

[15] The Environment Court is not a court of general jurisdiction, and its functions are limited to those entrusted to it by Parliament. It has no jurisdiction in constitutional matters, nor on questions of title to land. However if we assume jurisdiction to consider this appeal, it is appropriate that we give our reasons for our understanding that the Court is entitled (and bound) to exercise that jurisdiction.

[16] First, we accept the District Council's submission that any person is entitled to apply for resource consent under the Resource Management Act, and that ownership of the resources involved is not a condition of eligibility.⁴ Secondly, the consent authority to which application is made is identified by its functions under the Act in respect of the relevant region or district, not by ownership of the resources.⁵ Thirdly, a person who made a submission on a resource consent application is entitled to appeal to the Environment Court against the consent authority's decision,⁶ and on such an appeal the Court has the same power, duty and discretion as the person against whose decision the appeal is brought,⁷ and may confirm, amend or cancel the decision.⁸

[17] In this case the Waikato District Council, which applied for resource consent for the proposed discharge, is a local authority under the Local Government Act 2002 and being a body corporate,⁹ is a person entitled to apply for resource consent under the Resource Management Act for the proposed discharge. The Waikato Regional Council is the duly constituted Regional Council for the Waikato Region, which includes Raglan township and the Raglan Harbour (Whaingaroa).¹⁰ As such,

² Environment Court Decision W074/99.

³ Environment Court Decision A078/03.

⁴ RMA, s 88(1).

⁵ See definition of 'consent authority' in RMA in s 2(1), and s 88(1).

⁶ RMA, s 120(1).

⁷ RMA, s 290(1).

⁸ RMA s290(2).

⁹ Local Government Act 2002, s 12(1).

¹⁰ Local Government (Waikato Region) Re-Organisation Order 1989.



it had the duty to consider that resource-consent application, and to grant or refuse the consent.¹¹ The appellants having lodged submissions with the Regional Council on the District Council's resource-consent application, they were entitled to, and did, appeal to the Environment Court against the Regional Council's decision. So we hold that in deciding the appeal the Environment Court has the same power, duty and discretion as the Regional Council had in respect of the District Council's resource-consent application, and has jurisdiction to confirm, amend, or cancel the decision to grant it, and to impose conditions.

[18] Returning to Nga Uri's submission, we do not accept the proposition summarised in paragraph [13](b), nor that in paragraph [13](c). It is not necessary for us to give a decision on the proposition in paragraph (a) (Nga Uri's assertion of sovereignty) in order to decide that the Environment Court has jurisdiction to hear and decide the appeal, so we decline to consider that matter further. In short, we hold that the Environment Court does have jurisdiction to decide this appeal.

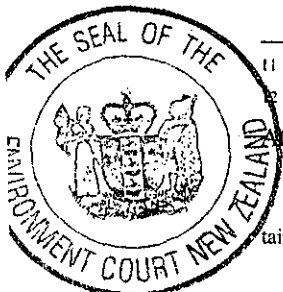
Application of 2003 Amendment Act

[19] The appeal was lodged in May 1999. The District Council and the Regional Council submitted that as the application was lodged before 1 August 2003, section 112 of the Resource Management Amendment Act 2003 requires that it be dealt with as if the Amendment Act had not been passed. That was not contested by the appellants or by Nga Uri.

[20] We consider that it was the date of lodging the appeal that is relevant, rather than the date of lodging of the application.¹² But in this case that does not lead to a different result. We hold that in deciding this appeal we are to apply the Resource Management Act as if the 2003 Amendment Act had not been enacted.

Statutory directions

[21] We now identify the directions contained in the Act that govern the Court's decision of the appeal.



¹¹ RMA, s 105(1)(c) (as if the 2003 Amendment Act had not been enacted).
¹² *Omokoroa Ratepayers Assn v Western Bay of Plenty District Council Environment Court Decision* 2017/04.

Part II

[22] Part II of the Act states purposes and principles. Section 5 describes the purpose of the Act, by reference to which the decision on a resource consent application should be made.

[23] Section 6 directs that those exercising functions and powers under the Act are to recognise and provide for certain matters of national importance. Relevantly, those matters include the relationship of Maori and their culture and traditions with their ancestral land, water, sites, waahi tapu, and other taonga.¹³ Section 7 directs that particular regard is to be had to certain matters, including kaitiakitanga,¹⁴ which is defined¹⁵ as:

... the exercise of guardianship by the tangata whenua of an area in accordance with tikanga Maori in relation to natural and physical resources, and includes the ethic of stewardship.

[24] Section 8 directs functionaries to take into account the principles of the Treaty of Waitangi.

Section 104

[25] Section 104 specifies matters to be considered in deciding a resource consent application. Subsection (1) lists actual and potential effects on the environment, contents of relevant planning instruments, and any other relevant matters that are reasonably necessary to determine the application. Subsection (3) applies to applications for discharge permits or coastal permits for discharge of contaminants. It stipulates that in having regard to the actual and potential effects on the environment, regard is to be had to:

- (a) *The nature of the discharge and the sensitivity of the proposed receiving environment to adverse effects and the applicant's reasons for making the proposed choice; and*
- (b) *Any possible alternative methods of discharge, including discharge into any other receiving environment.*

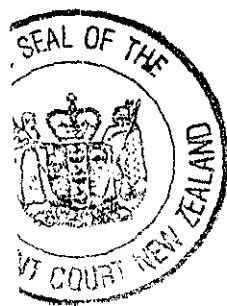
[26] The term 'environment' is given this extended meaning:¹⁶

¹³ RMA, s 6(e).

¹⁴ Ibid, s 7(a).

¹⁵ Ibid, s 2(1).

¹⁶ By RMA, s 2(1).



"Environment" includes –

- (a) Ecosystems and their constituent parts, including people and communities; and
- (b) All natural and physical resources; and
- (c) Amenity values; and
- (d) The social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c) of this definition or which are affected by those matters.

The permitted baseline

[27] In addition to those express directions in the Act, in determining effects on the environment consent authorities are to apply the permitted baseline, and only consider effects that would be other than, or further than the effects of non-fanciful permitted activities.¹⁷

Section 105

[28] We state our finding that the proposal is a discretionary activity at paragraph [85]. Section 105(1) provides that after considering an application for a resource consent for a discretionary activity, a consent authority may grant or refuse the consent, and (if granted) may impose conditions under section 108.

Section 107

[29] Section 107 contains directions about discharge permits:

107. Restriction on grant of certain discharge permits– (1) Except as provided in subsection (2), a consent authority shall not grant a discharge permit or a coastal permit to do something that would otherwise contravene section 15 or section 15A allowing–

- (a) The discharge of a contaminant or water into water; or
- (b) A discharge of a contaminant onto or into land in circumstances which may result in that contaminant (or any other contaminant emanating as a result of natural processes from that contaminant) entering water; or
- (ba) The dumping in the coastal marine area from any ship, aircraft, or offshore installation of any waste or other matter that is a contaminant, – if, after reasonable mixing, the contaminant or water discharged (either by itself or in combination with the same, similar, or other contaminants or water), is likely to give rise to all or any of the following effects in the receiving waters:
- (c) The production of any conspicuous oil or grease films, scums or foams, or floatable or suspended materials;
- (d) Any conspicuous change in the colour or visual clarity;
- (e) Any emission of objectionable odour.

¹⁷ *Smith Chilcott v Auckland City Council* [2001] 3 NZRMA 481 (CA); *Arrigato v Auckland Regional Council* [2002] 1 NZLR 323; [2001] NZRMA 481(CA).



- (f) The rendering of fresh water unsuitable for consumption by farm animals;
- (g) Any significant adverse effects on aquatic life.
- (2) A consent authority may grant a discharge permit or a coastal permit to do something that would otherwise contravene section 15 or section 15A that may allow any of the effects described in subsection (1) if it is satisfied—
 - (a) That exceptional circumstances justify the granting of the permit; or
 - (b) That the discharge is of a temporary nature; or
 - (c) That the discharge is associated with necessary maintenance work— and that it is consistent with the purpose of this Act to do so.
- (3) In addition to any other conditions imposed under this Act, a discharge permit or coastal permit may include conditions requiring the holder of the permit to undertake such works in such stages throughout the term of the permit as will ensure that upon the expiry of the permit the holder can meet the requirements of subsection (1) and of any relevant regional rules.

Section 108

[30] Section 108 authorises consent authorities to impose conditions on resource consents. We quote relevant provisions of that section:

(2) A resource consent may include any one or more of the following conditions:

- ...
 - Subject to subsection (8), in respect of a discharge permit or a coastal permit to do something that would otherwise contravene section 15 (relating to the discharge of contaminants) or section 15B, a condition requiring the holder to adopt the best practicable option to prevent or minimise any actual or likely adverse effect on the environment of the discharge and other discharges (if any) made by the person from the same site or source:

(8) Before deciding to grant a discharge permit or a coastal permit to do something that would otherwise contravene section 15 (relating to the discharge of contaminants) or 15B subject to a condition described in subsection (2)(e), the consent authority shall be satisfied that, in the particular circumstances and having regard to—

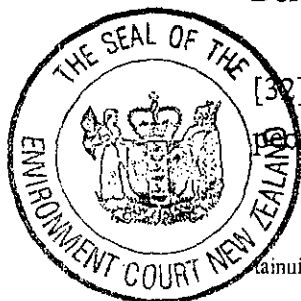
- (a) The nature of the discharge and the receiving environment; and
- (b) Other alternatives, including any condition requiring the observance of minimum standards of quality of the receiving environment— the inclusion of that condition is the most efficient and effective means of preventing or minimising any actual or likely adverse effect on the environment..

The existing environment

[31] Before outlining the current proposal, we describe the existing environment.

Description of locality

[32] Raglan is a small township with a permanent population in 2001 of 2,900 people, but many more in summer. The permanent population contains a relatively



high proportion of households on lower incomes compared with other communities in the Waikato District. The locality is one of relatively impermeable clay soils.

[33] The water of the Raglan Harbour (Whaingaroa) is generally of high quality. In fine weather, the water present throughout much of the harbour is mostly clean seawater. Heavy rain increases the proportion of freshwater which carries increased loads of contaminants (including faecal coliform bacteria, nitrogen and phosphorus) but even then, the water quality is usually satisfactory.

[34] Areas in upper reaches of the Raglan Harbour are used for bird roosting and feeding, and the entrance to the harbour is used by Hector's dolphins, and wading and coastal birds. The harbour is at the southern limit of mangroves. Parts of the Raglan Harbour are used for recreational swimming and for shellfish gathering. The open coast to the south of the harbour mouth, off Ngarunui Beach and Motu Bay, is popular for surfing.

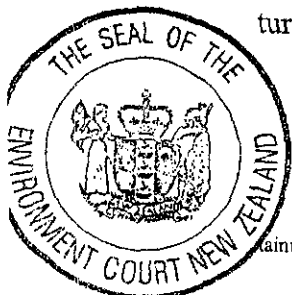
[35] Since the installation of a reticulated sewerage service in the 1970s, individual houses in Raglan do not have on-site sewage disposal systems. The majority of the properties vary between 400 square metres and 1,000 square metres in area, which is considerably smaller than the minimum size for conventional on-site disposal of 2,500 square metres prescribed by the Regional Council.

Population growth of Raglan

[36] Raglan has experienced rapid in-fill development in recent years which has led to the need for substantial upgrading of the infrastructure for the increased population density.

[37] As stated, the base population of Raglan in 2001 was 2900 people. The District Council predicted that by 2021, the base population will have grown to 4100 people, with a peak summer population (including day visitors) of 15,313 people compared with 9,100 in 2001.

[38] Te Kopua, to the west of Raglan township, is an area that is significant to people of Tainui Hapu, who have lived there for generations, and is their turangawaewae.



The existing sewage treatment and discharge

[39] The existing sewage treatment plant was commissioned in the mid-1970s, and is located at Riria Kereopa Memorial Drive, Te Kopua. The plant comprises two oxidation ponds contained by clay embankments. The ponds are currently operated in series, with raw wastewater entering the eastern end of the southerly pond, and treated effluent flowing from the western end of the northerly pond to a pumping station. Following an algal bloom, in the mid-1990s an aerator was installed in the southerly pond. The effluent is pumped through Te Kopua to an outlet pipe laid in the foreshore near the harbour entrance, from which it is discharged on outgoing tides.

[40] The ponds are inspected, and water samples taken for analysis, weekly. Between July 2000 and August 2002 the District Council monitored faecal coliform levels in the Raglan Harbour at points 50 metres upstream, and 100 metres downstream, of the outfall during ebb tides. Of 59 sets of samples analysed, 24 showed faecal coliform concentrations downstream of the outfall in excess of the those upstream; 22 showed concentrations upstream in excess of those downstream; and 13 showed identical concentrations on both sides of the outfall.

Relevance of effects of current system

[41] Several alleged adverse effects of the existing sewerage collection, treatment and discharge system were raised at the appeal hearing, including:

- (a) Stormwater ingress in the sewerage system.
- (b) Leaks from breakages in the Marine Parade rising main.
- (c) Algal bloom in the oxidation ponds.
- (d) Overtopping of oxidation pond embankments in the early 1990s.
- (e) Discharge of effluent on incoming tides.
- (f) Foam and discoloration in harbour water.
- (g) Faecal matter floating in harbour water.



[42] The District Council accepted that there is some ingress of stormwater to the existing sewerage system. It maintained that replacement of the former Marine Parade rising main had ended the leakages. It contended that there had been no algal bloom in the oxidation ponds since the aerator was installed. Overtopping of the oxidation ponds and discharge of effluent on incoming tides had resulted from high rainfall. It contended that foam, discoloration, and faecal matter observed in harbour water had not originated from the sewage treatment plant.

[43] The subject of this appeal is the discharge of treated effluent from the proposed treatment plant. The appeal does not provide an appropriate opportunity for airing criticism of the District Council for its past management of the existing system.

[44] As the discharge conditions proposed would define the quality of the effluent discharged, stormwater ingress in the sewerage system is not relevant to the decision of the appeal. Nor are past leakages from a former rising main in Marine Parade that has since been replaced. Similarly, inadequate capacity of the existing ponds (leading to overtopping, or to discharge on incoming tides) does not bear on the proposal that involves new ponds with greater capacity. Nor does an event of algal bloom occurring prior to installation of an aerator (the new oxidation pond having better configuration and including aeration). Whatever the source of foam, discoloration and faecal matter observed in the past in the harbour waters, the conditions proposed would not authorise discharge of any source of foam, of discoloration, or of faecal matter.

[45] Therefore we hold that the criticisms of the District Council in respect of those past events are not relevant to decision of the appeal, and we make no findings of their validity.

The proposal

[46] When the consents for the existing plant were due for renewal, the District Council proposed to make improvements to the treatment process to enhance the quality of the discharge and increase the capacity of the system. The Council proposed constructing a new pond and wetland system behind the existing ponds, and a new outfall with the discharge point extended further out into the main channel, to minimise any chance of backwash of treated effluent into the harbour. The effluent would meet the New Zealand bathing-water guidelines.



[47] After the appeal was lodged, an unusually lengthy period of consultation and mediation followed. A working party of representatives of the appellants and the District Council met usually monthly for some two years to investigate alternative treatment and disposal options. Regional Council staff attended most working party meetings too.

Modification of proposal and conditions

[48] In the result, the District Council adopted further improvements to the proposed treatment train and discharge system. It would be a partly-aerated oxidation-pond system followed by a maturation pond, a small wetland and mechanical filtration with ultra-violet disinfection, and a holding pond. The capacity of the main pond and provision for peak-flow storage is designed for a population of approximately 10,800¹⁸ predicted for the year 2021. Additional land is available on the site for expansion in the capacity of the plant beyond the design period.

[49] The District Council's appeal¹⁹ challenged a condition imposed on a designation of the treatment works site, requiring restoration of the 1944 tidal stream alignment. The condition also required removal of the treatment system from the whole area of the existing No. 2 Pond, and its rehabilitation and replanting, to recognise the 'site' of a taniwha.

[50] Following investigation and report by consulting engineers, a revised condition was proposed that described the works to be carried out by reference to a concept plan prepared by the consulting engineers, and omitting reference to the taniwha. Consequential amendments were also proposed to other conditions.

[51] No other party sought to be heard on the District Council's appeal, and no opposition was expressed to the proposed modifications of the conditions. We are satisfied that the replacement conditions are appropriate, and the Court is making the order sought.

[52] The revised proposal also required amendments to the conditions of the consent for discharge of effluent. Those amendments included the following:



¹⁸ Peak summer population equivalent, including day visitors.
¹⁹ RMA 299/99.

- (a) The term of the consent to be for 15 years.
- (b) The works to be certified by a qualified registered engineer.
- (c) Tainui Hapu to be consulted on the management plan for the works, and annual reviews of it.
- (d) Biennial reviews of conditions including the limits for concentrations in the effluent.
- (e) Tainui Hapu to be consulted on contingency plan for environmental hazards, and annual reviews of it.
- (f) The volume of effluent to be discharged limited to 2,600 cubic metres per day for the first 5 years, and provision for reviews.
- (g) The acceptability of the discharge to Tainui Hapu to be an element in an effects assessment report by the fifth anniversary of granting the consent.
- (h) The discharge of effluent to be limited to 5 and a half hours per tide, commencing no earlier than half an hour before high tides and ceasing no later than 1 hour before low tides (with a proviso for extreme weather).
- (i) There is to be no conspicuous discharge of oil or grease or surface foam.
- (j) Suspended solids are not to exceed a median of 10 grams per cubic metre for 12 consecutive monthly samples and a maximum of 30 grams per cubic metre for 9 of 10 consecutive monthly samples.
- (k) The BOD₅ concentration is not to exceed a median of 10 grams per cubic metre for 12 consecutive monthly samples and a maximum of 20 grams per cubic metre for 9 of 10 consecutive monthly samples.
- (l) Faecal coliforms in the discharge are not to exceed a median of 14 per 100 millilitres for 12 consecutive monthly samples and a maximum of 43 per 100 millilitres for 9 of 10 consecutive monthly samples.



(m) The concentration of enterococci is to be less than 35 per 100 millilitres for 5 of 6 consecutive weekly samples.

[53] The median faecal-coliform concentration of the treated wastewater would not exceed 14 per 100 millilitres, which would meet the limits specified in the Microbiological Water Quality Guidelines for Marine and Freshwater Recreational Areas, updated 2003, published by the Ministry for the Environment and the Ministry of Health (shellfish-gathering standard). This means that shellfish grown in undiluted treated effluent from the treatment plant would meet Ministry of Health guidelines for consumption. Compared to the existing discharge, this represents a bacterial reduction of 3 orders of magnitude.

[54] The treated water would be stored in a holding pond and discharged to the harbour commencing 30 minutes prior to high tides and ceasing 5 hours after high tides, to take best advantage of the flushing action of the outgoing tide and minimise the amount of treated wastewater being washed back into the harbour after the tide has turned.

[55] The District Council abandoned its earlier plan for a new extended outfall for two reasons:

- (a) The improved dispersion of the effluent plume from the extended outfall was not needed for the higher quality effluent:
- (b) In response to cultural concerns about a new structure on the harbour-bed.

The proposal before the Court involved continued use of the existing discharge pipe.

[56] Construction of the new plant would allow removal of the northerly existing oxidation pond, and its restoration to a tidal wetland. As this area is said to be a waahi tapu (being the lair or den of the taniwha *Te Ataiorongō*), the restoration work would be designed in consultation with tangata whenua.

Further amendments of conditions

[57] At the appeal hearing, the District Council sought an amendment of the median limit of suspended solids in the discharge from 10 to 20 grams per cubic metre. The reason was to allow for more algae (plant) solids to be retained in the



effluent, so that chemical dosing and production of flocculated algal sludge at the treatment plant could be minimised.

[58] No party opposed that amendment. If the discharge consent is confirmed, we will amend Condition 15 of Consent 971390 accordingly.

[59] In addition the District Council sought amendment of the resource consent conditions to allow for modification of the design or layout of elements of the treatment plant. The reason for that was to enable other treatment technology that may prove beneficial for the treatment process or environmental outcomes. It was accepted that adoption of any such modifications would still have to comply with the conditions specifying the discharge parameters, and control of sediment during construction.

[60] No party opposed that amendment either. Again, if the discharge consent is confirmed we will amend the appropriate condition accordingly. The other consents, which are not challenged by this appeal, can be amended too.

[61] We consider this appeal on the basis that the conditions of the designation and the discharge permit are amended as proposed.

Planning instruments

[62] We now have regard to relevant provisions of applicable planning instruments under the Act.

New Zealand Coastal Policy Statement

[63] The New Zealand Coastal Policy Statement²⁰ describes preservation of the natural character of the coastal environment as a national priority,²¹ and states that protection of the characteristics of the coastal environment of special value to tangata whenua should be carried out in accordance with tikanga Maori.²² Another policy is for protection of habitats in the coastal marine area of species that are important for commercial, recreational, traditional or cultural purposes.²³

²⁰ NZ Gazette, 5 May 1994, pg 1563.

²¹ Policy 1.1.1.

²² Policy 2.1.2.

²³ Policy 3.2.8.



[64] Policy 3.2.2 specifies the avoidance of adverse effects where practicable, and if not practicable then adverse effects should be mitigated and remedied to the extent practicable.

Waikato Regional Policy Statement

[65] Next we have regard to relevant provisions of the Waikato Regional Policy Statement.²⁴

Tangata whenua relationship

[66] There is an objective of recognising the relationship that tangata whenua have with natural and physical resources.²⁵ Policy One for achieving that objective is to ensure that the relationship is recognised in resource-management decision-making. Policy Two for achieving the objective is to have particular regard to the role tangata whenua have as kaitiaki, and provision for practical expression of kaitiakitanga.

[67] Another objective of the regional policy statement is the maintenance and enhancement of the quality of coastal water.²⁶ Policy One for achieving that objective allows development by ensuring that the effects of use and development do not compromise water quality.

[68] Another objective is for integrated management and the avoidance of unforeseen adverse effects.²⁷ Policy Two for achieving that objective is to take into account the relationship tangata whenua have with the coastal environment when decisions relating to the use, development and protection of the coastal environment are made.

[69] There is also an objective of maintaining or enhancing biodiversity.²⁸ Policy One for achieving that objective allows the use and development of natural and physical resources while avoiding, remedying or mitigating adverse effects.

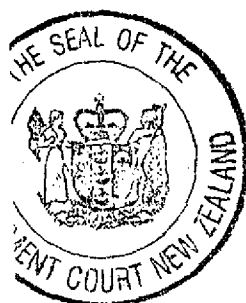
²⁴ Operative 8 November 2002.

²⁵ Objective 2.1.5.

²⁶ Objective 3.5.5.

²⁷ Objective 3.5.6.

²⁸ Objective 3.11.4.



Transitional Waikato Regional Coastal Plan

[70] It was the Regional Council's evidence that there is no provision of the transitional regional coastal plan that is relevant to the proposal. That was not disputed. Accordingly we give no further attention to that instrument in this decision.

Proposed Waikato Regional Coastal Plan

[71] There is an objective of seeking preservation and restoration of the natural character of the coastal environment.²⁹ A policy for achieving that objective is to protect the habitats of commercial, traditional or culturally important species.³⁰

[72] Another objective is to maintain or enhance existing amenity values within the coastal marine area.³¹ There is also an objective of protecting the integrity and resilience of coastal processes from the adverse effects of use and development.³² A policy for achieving that objective is ensuring the protection of biodiversity, the inter-relatedness of coastal ecology, and the natural movement of biota within the coastal marine area.³³

[73] A further objective is that the quality of water in the coastal marine area is maintained or enhanced.³⁴ A policy³⁵ for achieving that objective is that where water quality in the coastal marine area has been adversely affected, point source discharges are to maintain or enhance the water quality. Existing discharges are to be managed to achieve or contribute to an improvement in water quality.

[74] There is also an objective that maintenance of structures in the coastal marine area is to protect natural character and amenity values; avoid adverse effects on the environment and on natural processes; not constitute a hazard to navigation; and take into account other uses of the coastal marine area and adjacent land.³⁶ For achieving that objective, there is a policy of promoting the use of existing network utility

²⁹ Objective 3.1.
³⁰ Policy 3.2.2.
³¹ Objective 3.3.
³² Objective 3.4.
³³ Policy 3.4.3.
³⁴ Objective 4.1.
³⁵ Policy 4.1.3.
³⁶ Objective 5.1.



structures where there are no practical alternatives available outside the coastal marine area, subject to the structure being located outside an area of waahi tapu.³⁷

[75] The regional coastal plan identifies areas of significant conservation value, but the proposed discharge of treated effluent is not in the vicinity of any of them.

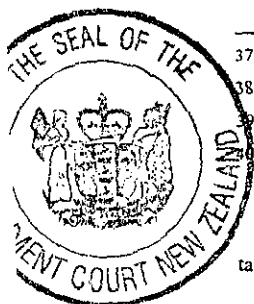
[76] Discharge into the coastal marine area of treated sewage that has passed through soil or a wetland is classified as a discretionary activity.³⁸ Use of existing structures that have not been specifically provided for or that do not comply with a rule in the plan are also classified as discretionary activities.³⁹

[77] The plan specifies no fewer than 18 criteria for deciding applications that repeat, in different language, relevant provisions of the Act, the New Zealand Coastal Policy Statement, the Waikato Regional Policy Statement, and objectives and policies of the plan itself. Relevantly, they include consideration of alternatives outside the coastal marine area; iwi concerns; effects on water quality; enabling provision for the social, economic and cultural well-being of iwi or hapu; and the Treaty relationship between the Crown and tangata whenua.

[78] In addition, there is also an objective of making consistent decisions,⁴⁰ and a policy of applying key principles to that end. The key principles include taking a precautionary approach, taking community and tangata whenua interests into account, the need for the activity in a coastal location, the benefit of the activity to the public, mitigation of adverse effects, and recognising benefits and costs. There is also a policy of imposing review conditions on coastal permits where future effects may be unexpected or uncertain.

Transitional Waikato Regional Plan

[79] It was the Regional Council's evidence that there is no provision of the transitional regional plan that applies to the proposal. As that was not contested, we give no further attention to that instrument in this decision.



³⁷ Policy 5.1.2.
³⁸ Rule 16.3.9.
 Rule 16.2.24.
 Objective 12.1.

Proposed Waikato Regional Plan

[80] Decisions have been given on submissions on the proposed Waikato Regional Plan, but some references to the Court of contents of the plan have yet to be decided. We therefore refer to the proposed plan as amended by decisions on submissions.

[81] The proposed plan contains controls⁴¹ (subject to appeal) on diversion of water by culverts which apply to the District Council's proposal. However that is not the subject of this appeal, so we do not need to consider it further in this decision.

[82] Similarly the proposed plan governs discharges to air and soil disturbance involved in the District Council's proposal but they, too, are not the subject of this appeal.

Waikato District Plan

[83] The site for the new treatment plant is to be designated in the Waikato District Plan, but as this appeal does not challenge that designation, we do not need to consider the designation further in this decision.

The status of the proposed activity

[84] It was the Regional Council's case that the consent required in terms of the transitional regional coastal plan is innominate or unclassified, and that the consent required in terms of the proposed regional coastal plan for both the discharge and for maintenance of the outfall pipe is as discretionary activities.⁴² The evidence of Mr M B Chrisp, called for the District Council, was to the same effect.

[85] That evidence was not challenged or contradicted by the appellants. We accept it and so find.



⁴¹ Rules 3.6.4.13 and 4.2.9.3.

⁴² Evidence of S A Roa, paras 41 and 57.

Actual and potential effects

[86] Now we turn to have regard to the actual and potential effects on the environment of allowing the activity.⁴³ Before we review the evidence we have to identify the environment affected.

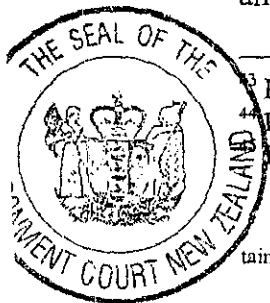
The environment affected

Cultural effects

[87] It was the appellants' case that continued discharge of treated wastewater to the harbour waters would have adverse effects on tangata whenua, on tikanga Maori, on the taonga of the environment of the harbour; and would undermine their ability to develop their own economic base, to harvest and gather fish and shellfish for customary use, and to offer them to visiting iwi. The basis for those assertions is that in tikanga Maori, human waste (even if treated) should be separated from the moana food source. So it was claimed that the effect of the discharge would be that the traditional practice of harvesting fish and gathering shellfish from the harbour would remain culturally unacceptable.

[88] That was the very heart of the appeal. It relates to the element of sustainable management of enabling people and communities to provide for their social, economic and cultural wellbeing, and for their health and safety. It also relates to the element described in paragraph (d) of the definition of 'environment', being social, economic, aesthetic and cultural conditions affected by natural and physical resources.

[89] Even so, in this case the same important assertions have to be considered under Part II of the Act in respect of the relationship of Maori and their culture and traditions with their ancestral land, water, sites waahi tapu and other taonga,⁴⁴ and in respect of kaitiakitanga.⁴⁵ Those provisions of Part II are more specific than the general duty under section 104(1) to have regard to effects on the environment of allowing an activity. They are also more imperative, in that section 6 directs functionaries to "recognise and provide" for them as matters of national importance, and section 7 directs that functionaries "have particular regard" to them. By



⁴³ Resource Management Act, s 104(1)(a) prior to 2003 amendment.

⁴⁴ Resource Management Act, s 6(e).

⁴⁵ *Ibid*, s 7(a).

comparison section 104(1) directs that a consent authority is to “have regard” to the actual and potential effects on the environment of allowing the activity.

[90] The appellants’ assertions are not so much of effects as such, but of indirect or consequential results of the discharge. To give them the full weight indicated by Part II, we will address them in applying Part II of the case. To avoid duplication, we do not also have regard to them in carrying out the duty imposed by section 104(1). We confine our consideration under that provision to the actual and potential effects on the other elements of the environment, being ecosystems, natural and physical resources and amenity values.

The existing environment

[91] The District Council made these submissions about identifying the environment that is open to being affected by the proposed discharge:

- (a) That the Court has to consider the proposal in the context of the environment as it exists now, not by reference to the environment that existed prior to the existing sewerage scheme (citing *Marlborough District Council v NZ Rail*.⁴⁶)
- (b) That (despite *Sampson v Waikato Regional Council*⁴⁷) the Court should not consider the environment as if the existing sewerage scheme had been discontinued.

[92] The Appellants’ case invoked comparison of the current environment with what existed decades ago, prior to installation of the existing sewerage system. The Regional Council joined issue with the District Council’s submission (b). We summarise the parties’ cases on each issue separately.

The environment prior to the existing sewerage scheme

[93] The appellants’ case invoked the environment of historic times, prior to the installation of the existing sewerage system. Witnesses described the Raglan Harbour in the middle of the last century.

⁴⁶ [1995] NZRMA 357 (PT).

⁴⁷ Environment Court Decision A178/02.



[94] Mr James Rickard reported that when he arrived in Raglan in 1945 the harbour was clean, the water was clear, and there was an abundance of seafood, including shellfish and flounder. He described abundant quantities of mussels available for special occasions. Mr Rickard also described the resources of the Wainui Stream which runs past Te Kopua, including whitebait, eels, and sea-snails. Mr Rickard stated that the stream was also used as a source of drinking water, for bathing, washing, access and social activities. The witness compared unfavourably the present environment with that of the mid-1900s, mentioning particularly destruction of shellfish beds, so that families are no longer able to gather food in traditional places.

[95] Mrs Josephine Kereopa reported that her father had told her of fishing, floundering and gathering kaimoana at Te Upoko, Te Kopua and Ngarunui, when young; but when he had returned to Te Kopua to retire (after the sewerage works had been installed), he would not allow his children or grandchildren to swim, fish or gather kaimoana.

[96] The District Council accepted that the Raglan Harbour environment is not what it used to be, and through a combination of factors (of which the existing wastewater treatment plant is at most a minor one) the environment has changed dramatically since the 1970s, so that even if wastewater discharge is fully ceased, tangata whenua may not be able to re-establish their traditional practices for recreation and collecting kaimoana. The Council contended that farm and stormwater runoff are far more substantial sources of current contamination of the harbour than the present proposal would be. Counsel observed that while it would be ideal to return to the 1970s, that is not possible.

[97] The District Council submitted that as a matter of law, the Court cannot assess the proposal against the environment that existed in the 1970s, but has to consider the effects of allowing the activity by reference to the environment as it exists now. They relied on the fast ferries case *Marlborough District Council v NZ Rail*.⁴⁸

The environment if the existing sewerage scheme was discontinued

[98] Counsel for the District Council acknowledged that in *Sampson*, the Court held that in respect of regional consents the environment should be what might exist



⁴⁸ [1995] NZRMA 357 (PT).

if the existing activity was discontinued. But they argued that in this case, if the application is refused, the existing wastewater discharge will need to continue until a viable alternative is found, which would be at least five years. So they contended that it would be anomalous not to consider the effect that the existing discharge has on the quality of the harbour waters. They added that if the Court follows *Sampson*, the effects of the existing discharge should be considered as a matter relevant and reasonably necessary for the Court to determine the application under section 104(1)(i).

[99] Counsel for the Regional Council submitted that *Sampson* correctly represents the law. He observed that as there is no provision for rolling over or renewing a regional consent, so that a fresh application must be made, if the Court were to decline the District Council's application, the District Council would not be entitled to continue the existing discharge. The baseline for the assessment of effects is the environment as it would exist if consent were to be refused.

[100] In reply counsel for the District Council observed that it would be impossible to identify the environment that would exist if the existing discharge ceased, because the adverse effects on the environment cannot even be guessed; and that if the existing discharge is treated as part of the environment, then the consent authority would never be able to conclude that a renewal would have adverse effects on the environment unless it involved intensifying the activity.

Finding on identification of the environment

[101] We begin our consideration with the meaning given to the term 'environment' which we quoted in paragraph [26].

[102] In *Aley v North Shore City Council and Anzani Investments*⁴⁹ the High Court held that consideration of the effect on the environment of the activity for which consent is sought requires an assessment to be made of the effects of the proposal on the environment as it exists.

[103] Applying that High Court interpretation, and following the Planning Tribunal decision in the fast ferries case,⁵⁰ we hold that the Court has to have regard to the effects of allowing the proposed discharge on the environment as it exists at the time

⁴⁹ [1991] 1 NZLR 365; [1998] NZRMA 361; 4 ELRNZ 227 (Salmon J).

⁵⁰ *Marlborough District Council v NZ Rail* [1995] NZRMA 357 (PT).



of the appeal hearing; and that it is not appropriate to judge the application by reference to the effects it would have on the environment as it existed at a halcyon time in the past, reported with such nostalgic pleasure by Mr James Rickard and by Mrs Josephine Kereopa's father.

[104] We turn to the question whether the existing discharge is an element of the environment that might be affected by the proposed activity. In *Sampson* the Environment Court held that in relation to water consents the existing environment must be determined as the environment that might exist if the existing activity (to which the water consents relate) were discontinued.⁵¹

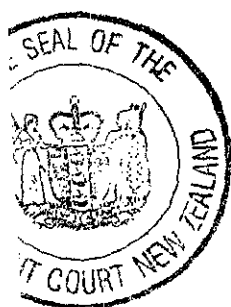
[105] However in this case, the existing treatment plant and discharge were lawfully being continued throughout the period of the appeal hearing. The environment that existed at the time the Court has to assess the effects of allowing the activity was an environment affected by those activities.

[106] The proposed treatment plan and discharge now sought are intended to replace the existing treatment plant and discharge. But, as counsel for the Regional Council pointed out, the Act makes no provision for renewal or rolling over existing consents. The District Council's applications are for fresh consents.

[107] Even so, in practice replacement of the existing plant and discharge could not happen immediately on the giving of a decision on this appeal confirming or modifying the consents granted by the Regional Council. The new treatment plant would have to be designed in detail, constructed, and commissioned – a process likely to take at least a couple of years or so.

[108] We also accept that it would be impracticable to suppose what the environment would be like if the existing treatment plant and discharge were discontinued before there is a replacement system in place for treating and disposing of the wastewater from Raglan. It would be fanciful to suppose that the inhabitants would be left to make their own independent arrangements for disposal of wastewater. Even a night-cart collection system (scarcely acceptable in a New Zealand town in the 21st century) would require sanitary disposal of the waste collected. The variety of other more sophisticated treatment and disposal methods and sites is such that the adverse effects on the environment cannot (as Mr Wright observed) even be guessed.

⁵¹ *Sampson v Waikato Regional Council* Environment Court Decision A178/02, para [33].



[109] In *Sampson*, the Court accepted that the identification of the existing environment and relevant effects are matters of fact to be assessed in each case, and not overlaid by refinements or rules of law.⁵² We accept that too.

[110] In the circumstances of this case we accept the District Council's submissions and find that it would not be practicable to have regard to the actual and potential effects of allowing the proposed discharge on an environment without the existing discharge.

Finding about effects

[111] We now review the evidence on the effects on the environment of allowing the proposed discharge, leaving for later consideration the evidence of cultural effects.

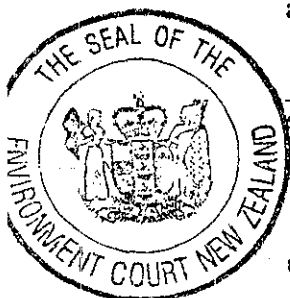
[112] We have already outlined the proposal. Following treatment of the sewage in the new treatment plant, effluent is to be piped to the existing outfall where it is to be discharged as stated during periods from half an hour before high tides to five hours before low tides, not exceeding 2,600 cubic metres in any 24-hour period, for the first 5 years of the proposed 15-year term. After 5 years the volume may be increased to 3,400 cubic metres per day.

Effects on ecosystems, natural and physical resources and amenity values

[113] The District Council's Development Services Engineer, Mr M J Safey, expressed confidence that the conditions can be achieved in practice. He was not cross-examined on that opinion, and no technically qualified witness contradicted it. Mr Safey gave the opinion that the treated water would have as much solid human waste and pathogens removed from it as is reasonably practicable, leaving a highly purified stream of treated water to be released to the harbour.

[114] Mr Safey was cross-examined by Mr Gregory about treatment of pathogens. The witness explained that during retention in an oxidation pond, pathogens are subject to ultra-violet radiation which causes substantial die-off, together with the absence of their natural host, the human body. He added that there would also be the

⁵² Citing *Arrigato Investments v Auckland Regional Council* [2002] 1 NZLR 323; [2001] NZRMA 481; 7 ELRNZ 193 (CA) para 38.



wetland system, mechanical filtration, and ultra-violet disinfection, which would provide far greater treatment of pathogenic organisms than the current system.

[115] Evidence was also given by Mr W N Vant, an environmental scientist employed by the Regional Council. He observed that the specified periods of discharge mean that the wastewater is generally likely to only enter the harbour on returning tides, by which stage it is likely to be highly diluted with clean seawater, so concentrations of wastewater-derived contaminants in the harbour are likely to be low, such that any effects of these are likely to be less than minor. However he considered it would be prudent to discourage shellfish-gathering within 200 metres of the discharge point.

[116] Mr Vant also considered that concentrations of sediments and BOD₅ in the wastewater would be sufficiently low that any effects of those contaminants at Ngarunui Beach are likely to be less than minor, and significant adverse effects unlikely. The witness confirmed that the levels of faecal bacteria there are unlikely to exceed the shellfish-gathering guideline, and would also be suitable for contact recreation.

[117] The acceptability of Mr Vant's evidence was not affected in cross-examination, nor contradicted by any qualified witness.

Finding on non-cultural environmental effects

[118] Having reviewed the evidence (save that of cultural effects), we find that there would be no significant actual or potential effect on the environment of allowing the proposed discharge of treated effluent from the sewage treatment works in accordance with the proposed conditions. Therefore, although the appeal has to be decided as if the Resource Management Amendment Act 2003 had not been enacted, there is no occasion to apply the permitted baseline in determining the effects on the environment.⁵³ Even if we had accepted the Regional Council's submission that we should consider effects on an environment after discontinuance of the existing treatment and discharge, our finding would be no different.



⁵³ *Bayley v Manukau City Council* [1999] 1 NZLR 568 (CA); *Smith Chilcott v Auckland City Council* [2001] 3 NZRMA 481 (CA); and *Arrigato v Auckland Regional Council* [2002] 1 NZLR 323 ; [2001] NZRMA 481; 7 ELRNZ 193 (CA).

Consultation

[119] The appellants invoked an obligation of consultation under the principles of the Treaty of Waitangi. They maintained that in breach of that duty the District Council had, regardless of consistent opposition to it by tangata whenua, persevered with the proposal to discharge effluent to the harbour and failed to substantively and comprehensively consider alternatives to it.

[120] The District Council contended that it had consulted fully with tangata whenua. On the complaint that regardless of opposition it had persevered with the harbour discharge proposal, the District Council submitted (citing *Minhinnick v Watercare Services*⁵⁴) that any duty to consult did not give tangata whenua a right to veto any proposal.

[121] Applying *Minhinnick v Watercare Services*, and following *Beadle v Minister of Corrections*,⁵⁵ *Land, Air Water Association v Waikato Regional Council*,⁵⁶ and *Minhinnick v Minister of Corrections*,⁵⁷ we hold that the Treaty principle of consultation does not give tangata whenua power to veto a proposal. That is particularly so where (unlike in the two Minister of Corrections cases) the applicant is not a Minister of the Crown.

[122] It was District Council's evidence that there had been consultation and mediation through the agency of the Raglan Wastewater Working Party, with Ms Catherine Delahunty assisting as an independent facilitator experienced in environmental issues. The working party had included representatives of the appellants and of the District Council, with Regional Council staff attending most of the meetings. They were full-day meetings which were held usually monthly over a period of two years. Mr Allis counted a total of 24 meetings, and Mr Rickard counted 27.

[123] As a result of the responses of tangata whenua, the District Council:

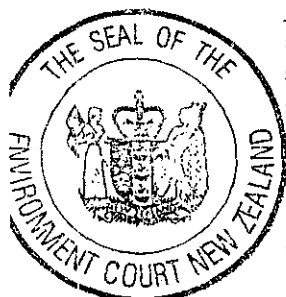
- (a) Engaged independent consulting engineers to investigate the feasibility of a number of options for discharging treated wastewater to land, instead of to the harbour: and

⁵⁴ [1998] 1 NZLR 294; [1998] NZRMA 113 (CA).

⁵⁵ Environment Court Decision A074/2002, para [549].

⁵⁶ Environment Court Decision A110/01, para [453].

⁵⁷ Environment Court Decision A043/04, para [282].



(b) Made major alterations to the proposed treatment plant and discharge structure, including demolition of one of the existing oxidation ponds (said to affect the taniwha's den) and restoration as a tidal wetland in consultation with tangata whenua; enhancement of the treatment process to achieve shellfish-gathering standard of the discharge; inclusion of a wetland stage in the treatment plant; and abandonment of the formerly proposed new outfall structure.

[124] We address the District Council's consideration of the land-disposal options in the next section of this decision.

[125] Mr Rickard, who attended the working-party meetings on behalf of tangata whenua, was critical that a soil scientist (Dr Singleton) had not made soil infiltration measurements at a site on Wainui Reserve that Mr Rickard had considered more prospective than sites where infiltration tests had been made.

[126] Mr R A Docherty (of the environmental engineering consultants Pattle Delamore) stated in cross-examination that in scoping his brief for the slow-rate irrigation option, he had gone over the brief with Mr Rickard prior to the initial site investigation, and that Mr Rickard had attended the site investigations associated with that. The witness confirmed that Mr Rickard had attended a site visit to the northern Wainui gullies area, and had attended the infiltration testing of Location IT2. He also stated that he had not relied on Dr Singleton's work and that Pattle Delamore had undertaken their own investigations regarding the infiltration capacities of the soil. They were typical of first-order or preliminary investigations that would be undertaken for work to prepare a report such as the one produced.

[127] From that evidence we are not able to come to a finding that the District Council's consultation was deficient. Having reviewed the totality of the evidence on this topic, we find that the District Council consulted tangata whenua fully, and made costly alterations to its proposal in response to tangata whenua concerns. We find that it made a genuine effort to respond as far as it considered practicable, and discharged any duty it had to consult with them.

Alternative sites and methods of discharge

[128] A major issue on this appeal was whether the District Council had made an adequate investigation of alternative sites and methods of disposing of the wastewater.



[129] The appellants contended that the District Council had resisted comprehensively investigating land-disposal options. They asserted that there was not a lack of a feasible affordable alternative, but a lack of commitment and incentive by the District Council to comprehensively investigate an alternative that does not require piping of effluent across their land and discharge into the waters of the harbour, which are offensive to them. The appellants sought that the term of the discharge consent be limited to 5 years, which would suffice for the District Council to find a disposal alternative.

[130] It was the District Council's case that it had given appropriate consideration to alternatives, and that a rigorous assessment of alternatives had found none that was feasible. It had asked the working party to identify potential alternatives to sea disposal, and had engaged independent consultants (Pattle Delamore) to review the feasibility of schemes recommended by the working party, and from their report had concluded that none was feasible or affordable by the Raglan community. The District Council maintained that the identification of potential alternatives had been largely influenced by tangata whenua and community input, and that all reasonable efforts had been made to explore properly alternative methods of disposal.

[131] It was the Regional Council's case that the evidence does not disclose any realistic option that has not been evaluated, or that having been evaluated has been found to be feasible. It submitted that cost and affordability are relevant considerations in assessing alternatives. The Regional Council had engaged an independent engineer, Mr J M Crawford, to review the options evaluated by the District Council for disposal to land. He had concluded that none of them is feasible.

The evidence on alternative sites and methods

[132] In his evidence Mr Docherty explained the predicted population of Raglan and resulting flows of sewage. He went on to explain that no attempt had been made to cater for flows from large storm events, as that would make land-disposal options more expensive and possibly unworkable. In such an event, the effluent that could not be disposed of on land would be discharged to the harbour from the existing outfall structure.

[133] Mr Docherty described four land disposal methods that he had investigated: slow-rate irrigation; rapid infiltration; satellite and cluster treatment systems; and evapotranspiration fields.



[134] He had considered three options for slow-rate irrigation on four different sites, three of which had been identified by the working group. Infiltration tests had been made at two separate sites. Option 1 involved using currently available public land only, with the remainder of the flow being discharged to the harbour. Option 2 involved purchasing additional land, to avoid discharge to the sea except for rainfall-induced peaks. Option 3 involved sufficient storage to avoid discharge to the harbour except after very large rainfall events. The estimated costs (including treatment but excluding land purchase and GST) were \$5.1 million, \$7.1 million, and greater than \$8.1 million respectively. Mr Docherty gave the opinion that because of the wet weather flows that have to be catered for, the cost, and the unsuitable soils, stand-alone slow-rate irrigation is not the best technical solution for Raglan.

[135] Mr Docherty had investigated disposal to rapid infiltration basins in three areas of sand dunes at Ngarunui Beach, where boreholes were monitored. Computer modelling had revealed that although rapid infiltration was technically feasible there, the allowable loading was so limited that rapid infiltration would not be suitable as a stand-alone disposal option.

[136] Satellite and cluster systems would involve reticulating sewage from the township to the treatment plant, treating it there, and pumping it back to Raglan to small land disposal fields. Mr Docherty concluded that this did not make good engineering sense, and raised public health issues.

[137] The witness had also concluded that evapotranspiration fields were not practicable in the Raglan climate, because the annual rainfall exceeds the water loss even using plants with a very high rate of transpiration.

[138] It was Mr Docherty's evidence that separating grey-water from blackwater,⁵⁸ and using the grey-water for toilet flushing, would reduce the volume of sewage for treatment by between 14% and 18%, so the area required for land-disposal would still be large. The witness identified disadvantages of using grey-water in that way, including need for maintaining a separate grey-water treatment system for each house, possibility of cross-contamination, and the need for dual piping systems. Mr Docherty gave the opinion that the disadvantages outweigh the advantages.



⁵⁸ Grey-water is all sewage other than that from toilets, and blackwater is all sewage.

[139] Mr Docherty also gave evidence of consideration given to treatment and disposal in the Koning Valley, south of the existing sewage treatment plant. After treatment in oxidation ponds and a wetland pyramid system, the effluent was to be disposed of in gravel-filled evapotranspiration beds in a herringbone pattern. He had concluded that the rate of infiltration of the effluent to the ground would leave a proportion of the effluent flowing over the ground to the Wainui Stream.

[140] In cross-examination, Mr Docherty stated that (apart from preparing approximate capital and annual operating and maintenance costs) he had not measured the economic impact of the options on the way of life of the Tainui Hapu, nor compliance of the options with Part II of the Act. He agreed that if sufficient land was available, and sufficient money, slow-rate irrigation was technically feasible in the area. He agreed that recycled wastewater is a possible source of water supply, and observed that generally the cost of recycled wastewater is reasonably high.

[141] Mr Crawford compared experience of effluent irrigation at Whangamata, Rotorua, Pauanui, Whiritoa, Taupo, State Highway 23, and Hautapu with the conditions available around Raglan. He observed that sites in steep country or in poorly draining soils often have problems, and concluded that acceptable application rates is an issue at Raglan. Mr Crawford also described experience of investigations of effluent disposal to land at Te Awamutu, Te Rapa, and central Hawkes Bay.

[142] It was Mr Crawford's evidence that for land to be suitable for effluent irrigation, it should be free-draining to allow year-round application and to minimize the area required, and there needs to be a method of disposal of the vegetation grown on the land, as it would not be acceptable for dairy pasture. He also observed that the land needs to be available close enough to the treatment plant, and at a price, that is affordable to the community.

[143] Mr Crawford concurred with Mr Docherty's findings that the area available for slow-rate irrigation would not sustain winter irrigation without overland flow eventuating, although he observed that irrigation of a tree crop, such as radiata pine, might be feasible. The witness also agreed that the sand dunes at Ngarunui Beach are not suitable for rapid infiltration disposal of the effluent, and that a combination of slow-rate and rapid infiltration options would not be capable of disposing of the treated wastewater flows either.



[144] In his evidence, Mr Crawford also considered separate treatment and disposal in subcatchments (satellites) and clusters, pretreatment at individual properties, and the Koning Valley wetland pyramid and evapotranspiration beds option. He concluded that none of the options evaluated for land disposal of treated wastewater is feasible.

[145] Mr G J Allis is the District Council's Community Assets Group Manager. He gave evidence that increasing the quality of the treated wastewater to shellfish-gathering standard would increase the cost of treatment, and that the Council had agreed to that. He stated that the Council rates the Raglan urban area with a separate wastewater rate. Showing calculations of capital and operating costs for the proposed treatment and discharge and for the slow-rate irrigation option, this witness gave the opinion that if the latter option is adopted the wastewater rate would increase from the current level of \$420 to \$650 in 2005/06 and \$800 in 2006/07. That increase, combined with the effects of an average 66% increase in average capital values in Raglan, and projected increases in targeted rates and charges for other infrastructure and services, would impose a hefty increase in the total rates over the next three years.

[146] Mr Allis reported that the District Council had concluded that such increases would be unacceptable to the Raglan community as a whole, and would adversely affect those on low or fixed incomes, particularly as it would still not meet the ideals of the appellants in that an overflow discharge to the harbour would still occur in occasional large storm events.

[147] In cross-examination, Mr Allis stated that because of the cost of investigations the most likely land disposal options had been investigated; and that affordability is one of the factors to be weighed by the Council in making decisions. Asked whether the Council would investigate a land-based option that met tangata whenua bottom-lines with a view to decommissioning the pipeline, he thought that it would if satisfied that it was viable, that it was not repeating investigations already made, and that it would be economically viable for the community.

Findings on alternative sites and methods

[148] In this appeal there are two occasions for considering the extent of the consideration given to alternative sites and methods of treating and disposing of the wastewater: as part of the process of consultation with tangata whenua, and the



direction in section 104(3). It is our understanding that in doing so, it is not for the Court to substitute its own judgement for that of the District Council about which site and method is to be preferred,⁵⁹ nor is it for the Court to eliminate speculative alternatives or suppositious options.⁶⁰ Rather, under section 104(3) the Court's role is to find whether, in proposing a discharge of contaminants, the District Council gave adequate consideration to alternatives that would avoid, remedy or mitigate the effects of the discharge of contaminants and made a reasoned choice. On consultation, the Court's role is to find whether the District Council gave adequate consideration to options that would avoid the concerns expressed by tangata whenua.

[149] On the evidence we have reviewed, we find that the extent of contaminants that would be discharged to the harbour would be negligible, and that the proposal would result in substantially less discharge of contaminants to the harbour waters than the discharge from the existing treatment plant. Even so, the District Council made extensive investigations into alternative methods, including discharge into land, and made a reasoned choice based on the relatively impermeable soils of the locality, and its judgement of the affordability of the higher cost by the community that would have to bear it.

[150] On consultation with tangata whenua, the District Council adopted a process that included a representative of them in the working party that identified options for investigation; it investigated a number of alternative sites and methods; and it was given independent professional advice that none was feasible in the circumstances. The acceptability of that advice was not undermined by cross-examination. Rather, it was reinforced by expert evidence of a peer review by Mr Crawford commissioned by the Regional Council.

[151] The evidence did not support the appellants' contentions that the District Council resisted comprehensively investigating land-disposal options. The evidence did not support their contention that failure to adopt land disposal was not a lack of a feasible affordable alternative, but a lack of commitment and incentive to comprehensively investigate an alternative. The evidence did not show the existence of a feasible and affordable alternative (affordability being for the District Council, as the proponent and an elected rating authority, to judge⁶¹).

⁵⁹ *Auckland Volcanic Cones Society v Transit NZ* [2003] NZRMA 316 (FC).

⁶⁰ *Environmental Defence Society v Mangonui County* (HC Auckland M101/81; 23/10/81, Speight J).

⁶¹ *Waimairi County v Christchurch City Council* Planning Tribunal Decision C30/82, pp 748, 765; *Dambourne v Auckland Education Board* Planning Tribunal Decision A54/85; *STOP Action Group v Auckland Regional Authority* (HC Wellington M514/85; 31/7/87, Chilwell J); *NZ Rail v Marlborough*



[152] We find that the District Council gave thorough and business-like consideration to alternatives, and despite being unable to avoid any discharge to the harbour, made a reasoned choice by enhancing the quality of treated wastewater to be discharged so that it would meet the shellfish-gathering standard.

Giving effect to statutory directions

[153] Earlier in this decision we identified several provisions in the Act directing how the appeal is to be decided. Of them we leave the directions in Part II to last, because they depend on our findings on questions raised in other directions, and because Part II is more influential in coming to our ultimate judgement.

[154] Section 104(1)(a) directs that we are to have regard to the actual and potential effects on the environment of allowing the activity. We have already done that in a previous section of this decision. We found that there would be no significant actual or potential effect on the environment of allowing the proposed discharge of treated effluent from the sewage treatment works in accordance with the proposed conditions.

[155] Subsequent paragraphs of section 104(1) direct that regard is to be had to relevant instruments under the Act. Earlier in this decision we identified the relevant instruments and the applicable provisions of them. Although the wording may differ, there is some repetition in the thrust of the provisions. They contain two main themes:

- (a) The natural character of the coastal environment is to be preserved, the quality of coastal waters and the biodiversity and habitats in the coastal marine area are to be protected, and adverse effects on them avoided (or if that is not practicable, mitigated or remedied).
- (b) Characteristics of the coastal environment of special value to tangata whenua are to be protected, and their relationship with natural and physical resources (including kaitiakitanga) is to be recognised and provided for.



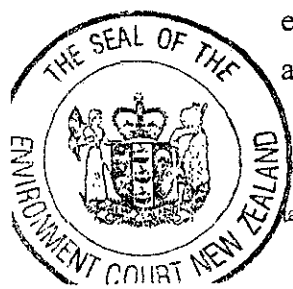
District Council [1994] NZRMA 70 (HC); Friends of Ngawha v Minister of Corrections (HC Wellington AP110/02; 20/06/02, Wild J).

[156] On the matters summarised in paragraph (a), we find that the adverse effect of the proposed discharge on the quality of coastal waters, and on the biodiversity and habitats of the coastal marine area, would be negligible. So adverse effects would be avoided and the natural character of the coastal environment would not be significantly affected.

[157] On the matters summarised in paragraph (b), we find that the District Council recognised that Tainui Hapu are tangata whenua and have a traditional and cultural relationship with Te Kopua and the water of Whaingaroa, including kaitiakitanga. The Council provided for those matters in these ways:

- (a) By consulting with them fully, and by responding to tangata whenua concerns as far as it considered practicable:
- (b) By investigating and giving thorough and business-like consideration to alternative methods and sites:
- (c) By proposing an alternative outfall pipeline route, and by abandoning it in response to tangata whenua concerns:
- (d) By raising the design standard of the treatment so that the discharge would be of shellfish-gathering standard:
- (e) By agreeing to abandon an existing oxidation pond and to restore its site to tidal wetland being the lair of the taniwha, *Te Ataiorongō* to a design on which tangata whenua are to be consulted:
- (f) By agreeing to include a wetland stage in the treatment process:
- (g) By conditions providing for consultation with tangata whenua over management and contingency plans and reviews of them, and including their attitude in the effects assessment report.

[158] Although that recognition of the characteristics of the coastal environment of special value to tangata whenua, and those provisions for their relationship, are not enough to satisfy Tainui Hapu, the recognition of and provision for their interests are substantial, and they do not have a power of veto.



[159] By section 104(3) we are directed to have regard to the nature of the discharge, the sensitivity of the receiving environment to adverse effects, the reasons for the choice, and any possible alternative methods of discharge including into any other receiving environment.

[160] The nature of the discharge is treated wastewater. That is mitigated by the high standard of treatment, including ultraviolet disinfection, by the proposed discharge standards, including those for faecal coliforms, BOD₅, suspended solids, and enterococci, and by discharging only on slack and ebb tides.

[161] Without belittling the importance of the harbour waters, they are not sensitive to adverse effects of discharges in compliance with those conditions. In our judgement, the absence of evidence of a feasible and affordable alternative that would allow disposal of the treated wastewater to land, the negligible effects of the proposed discharge complying with the proposed conditions, and tangata whenua opposition to the proposed new outfall were valid reasons for the District Council's choice of continuing to discharge at the existing outfall. (Use of the existing outfall structure is consistent with Policy 5.1.2 of the regional coastal plan.)

[162] By section 107(1) a consent authority is not to grant a coastal permit for discharge of a contaminant to water if, after reasonable mixing, there would be effects of the kinds described in paragraphs (c) to (g). There is no evidence that the proposed discharge would, on its own or in combination with other contaminants or water, have any of those effects. Proposed Condition 14 would prohibit any conspicuous discharge of oil or grease or foam. We find that the condition in section 107(1) is complied with, and that the controlled activity had power to grant the permit.

Application of Part II

[163] Having considered the application, our exercise of the discretionary judgement to grant or refuse consent conferred by section 105(1) is to be informed by the purpose of the Act stated in section 5, and the other provisions of Part II. Because the Act has a single purpose, and sections 6 to 8 are subordinate and ancillary to it, we apply the relevant provisions of those sections first, and then come to the overall broad judgement whether granting consent would promote that purpose.



The relationship of Maori with their ancestral lands and water

[164] The appellants relied on the direction in section 6(e) to recognise and provide for the relationship of Maori, and their culture and traditions, with their ancestral lands and water. This is a matter of national importance.

[165] It was the appellants' case that the discharge of human waste to their ancestral water is inconsistent with tikanga Maori, and offensive to them. The enhancement of the quality of treatment would not mitigate that. It would not be tika for them to gather fish and shellfish from the harbour, and this would deprive them of a traditional source of food for customary use; and deprive them of opportunity to offer hospitality to other tribes, resulting in loss of mana.

[166] The District Council did not dispute that Tainui Hapu have a cultural and traditional relationship with Te Kopua as ancestral land, and with Whaingaroa as ancestral water. It did not dispute that according to tikanga Maori, fish and shellfish should not be taken from the water to which the treated wastewater would be discharged.

[167] The District Council maintained that the proposed discharge would not contribute in any way to an increased risk of illness from eating fish or shellfish from, or bathing in, the harbour. It maintained that the harbour waters in their current state are not suitable for bathing or shellfish-gathering due to other sources of contamination. And it contended that resource management decisions have to be made on real risk of adverse effects, not on perceptions that are not reasonably based on real risk (citing *Shirley Primary School v Christchurch City Council*⁶² and *Beadle v Minister of Corrections*⁶³). The District Council also submitted that the weight that can be given to metaphysical concerns should be reduced where those concerns are not represented by tangible effects (citing *Mahuta v Waikato Regional Council*⁶⁴ and *Beadle*, and distinguishing *Te Runanga o Taumarere v Northland Regional Council*⁶⁵ on this ground).

[168] In this case the appellants' attitude is not based on any tangible effect of the discharge. It is a response based on their cultural and traditional relationship with their ancestral water, provision for which is a matter that a consent authority has to

⁶² [1999] NZRMA 66 (Env Court).

⁶³ Environment Court Decision A074/2002.

⁶⁴ Environment Court Decision A91/98.

⁶⁵ [1996] NZRMA 77.



recognise and provide for. Given the powerful direction of section 6(e), it cannot be rejected outright as unreal.

[169] The District Council did not reject tangata whenua's opposition outright. On the contrary, it recognised and provided for tangata whenua's response:

- (a) in prolonged consultation with them:
- (b) in business-like consideration of many alternative sites and methods:
- (c) in agreeing to restore the taniwha's lair to a design on which they would be consulted:
- (d) in incorporating a wetland component in the treatment plant:
- (e) in enhancing the effluent standard: and
- (f) in providing for them to be consulted on the management and contingency plans and considering their attitude in the effects assessment report.

[170] If the District Council could reasonably have disposed of the effluent in another way, it would have done so. But it does have a public health responsibility to continue to provide a sewerage service for Raglan, and to improve the quality of the existing discharge.

[171] So in making our judgement whether the proposal would promote the sustainable management of natural and physical resources, we will take into account its effect on the relationship of tangata whenua, their culture and traditions, with their ancestral waters in their unwillingness to take fish and shellfish from Whaingaroa while the discharge continues, and the cultural losses that follow from that.

Kaitiakitanga

[172] By section 7(a), a consent authority is directed to have particular regard to kaitiakitanga. We find that the District Council did have particular regard to kaitiakitanga, in that it recognised Tainui Hapu's role as kaitiaki, and it provided opportunities for practical expression of guardianship of the natural and physical



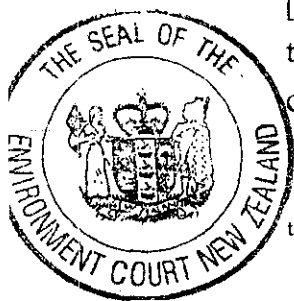
resources of the area in accordance with tikanga Maori in much the same ways as it provided for their cultural and traditional relationship with their ancestral lands and water, namely:

- (a) By prolonged consultation with Tainui Hapu.
- (b) By taking their views into account in developing the proposal (including thorough investigation of alternatives to disposal to the harbour which offended Tainui Hapu):
- (c) By abandoning the proposal for a new harbour outfall:
- (d) By adopting high discharge-quality standards, including shellfish-gathering quality in respect of faecal coliforms:
- (e) By agreeing to restore the taniwha's lair to a design on which the Hapu would be consulted:
- (f) By incorporating a wetland component in the treatment plant:
- (g) By conditions to avoid disturbance of sites of spiritual or cultural significance:
- (h) By protocols for dealing with any discovery of archaeological remains: and
- (i) By providing for Tainui Hapu to have ongoing roles in the development and review of the management and contingency plans and in the effects assessment.

[173] Even so, the appellants maintained that the continuation of the discharge for more than 5 years is fundamentally abhorrent to Tainui Hapu's tikanga, and undermines the ability of tangata whenua to fulfil their kaitiakitanga obligations, denying a legacy owed to future generations. We will have particular regard to that in coming to our judgement on the application.

Principles of the Treaty of Waitangi

[174] By section 8 of the Act, a consent authority is directed to take into account the principles of the Treaty of Waitangi. The appellants invoked the principles of consultation and of active protection, and contended that the District Council, by



failing to consider land-based alternatives substantively and comprehensively, despite consistent opposition by them to the harbour discharge, did not take those principles into account.

[175] The District Council relied on *Bleakley v Environmental Risk Management Authority*⁶⁶ in which the High Court held that the corresponding direction in the Hazardous Substances and New Organisms Act 1996 to take into account the relationship of Maori and their culture and traditions with their spiritual taonga required that it be considered in the course of making a decision as in all the circumstances was appropriate. Counsel contended that the development of the proposal in consultation with tangata whenua, and its consideration of land-disposal alternatives, satisfied the District Council's obligation under section 8. They argued that the fact that tangata whenua remain opposed is not conclusive of the proposal being contrary to Part II, in that tangata whenua do not have a right of veto (citing *Watercare Services v Minhinnick*⁶⁷).

[176] We accept that a consent authority's duty under section 8 corresponds to the duty of the Authority under section 6 of the 1996 Act. It does not amount to an obligation to give effect to the principles of the Treaty, nor does it give tangata whenua a power of veto.

[177] On the evidence we have not accepted the appellants' contention that the District Council failed to consider adequately sites and methods of disposal to land in the face of consistent opposition by them to the harbour discharge. We have found:

- (a) That the District Council consulted tangata whenua fully, made costly alterations to its proposal in response to their concerns, and discharged any duty it had to consult with them; and
- (b) That the District Council, in consultation with tangata whenua, made extensive investigations into discharge into land and after receiving independent expert advice, made a reasoned choice.



⁶⁶ [2001] 3 NZLR 213 (FC), 235 para [72].

⁶⁷ [1998] NZRMA 113, 127(CA).

[178] We understand the appellants' continued opposition to the harbour discharge. But the findings summarised in the previous paragraph lead us to conclude that the Treaty principles of consultation and active protection have been taken into account.

Promoting sustainable management

[179] The decision whether resource consent is to be granted or refused has to be made for the purpose of the Act, which is the promotion of the sustainable management of natural and physical resources.⁶⁸ The term 'sustainable management' is given this meaning.⁶⁹

In this Act, "sustainable management" means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety while—

- (a) *Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and*
- (b) *Safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and*
- (c) *Avoiding, remedying, or mitigating any adverse effects of activities on the environment.*

[180] Making such a decision involves assessing the conflict between the cases of the applicant and the appellants, and making a broad judgement comparing any conflicting considerations arising from the two main elements of the definition, the scale and degree of them, and their relative significance or proportion in the final outcome.⁷⁰

[181] *Watercare Services v Minhinnick*⁷¹ arose from an enforcement order application, not a resource consent application. Even so, we respectfully adopt the following passage from the Judgment of the Court of Appeal in that case as descriptive of the way in which we should make our judgement in this case:⁷²

The Court must weigh all the relevant competing considerations and ultimately make a value judgment on behalf of the community as a whole. Such Maori dimension as arises will be important but not decisive even if the subject matter is seen as involving Maori issues. Those issues will usually, as here, intersect with other issues such as health and safety: compare s 5(2) and its definition of sustainable management. Cultural wellbeing, while one of the aspects of section 5, is accompanied by social and economic wellbeing. While the Maori dimension,

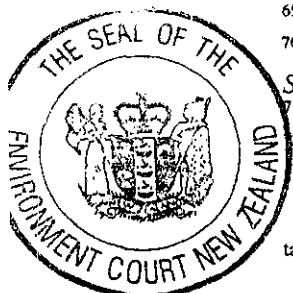
⁶⁸ Resource Management Act, s 5(1).

⁶⁹ Resource Management Act, s 5(2).

⁷⁰ *North Shore City Council v Auckland Regional Council* [1997] NZRMA 59 (HC); *TV3 Network Services v Waikato District Council* [1998] 1 NZLR 360, 371 (HC).

⁷¹ [1998] NZRMA 113 (CA).

⁷² *Ibid*, p 124, per Tipping J.



whether arising under s 6(e) or otherwise, calls for close and careful consideration, other matters may in the end be found to be more cogent when the Court, as the representative of New Zealand society as a whole, decides whether the subject matter is offensive or objectionable under s 314. In the end a balanced judgment has to be made.

[182] Section 6(e) of the Act directs that the relationship of Maori, their culture and traditions, with their traditional water is to be recognised and provided for as a matter of national importance. That deserves the close and careful consideration described in *Watercare*, but the Act does not require the absolute protection of traditional and cultural beliefs.⁷³

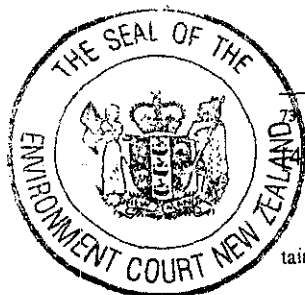
[183] We now pass to the task described in the last four paragraphs, for which the metaphor of scales is a helpful way of explaining the balancing process.

Judgement

[184] On one side of the scales we place the proposal, intended for carrying out the District Council's responsibilities for the future public health of the community of Raglan. The existing sewerage scheme produces effluent of a quality that is no longer acceptable for discharge to the harbour. The consents for the discharge have expired. And the treatment plant does not have capacity for the expected growth of the town. We find that the modified proposal now before the Court is a management of the use, development and protection of the natural and physical resources involved in a way, and at a rate, which enables the people and community of Raglan to provide for their social, economic and cultural wellbeing and for their health and safety. We also find that it would attain the aims described in paragraphs (a), (b) and (c) of section 5(2).

[185] Addressing the relative significance or proportion of those features of the proposal, we consider three factors:

- (a) The enhanced quality of treatment proposed:
- (b) The thorough and business-like investigations into alternative sites and methods of disposal of effluent: and



Friends of Ngawha v Minister of Corrections (HC Wellington AP110/02; 20/06/02 Wild J) para [9].

- (c) The consequences for the public health of the community if consent is refused, there being no evidence of a viable alternative that would enable the community to provide as well for their health.

[186] On the other side of the metaphorical scales we place the attitude of tangata whenua to discharge of human waste (no matter how highly treated) to harbour waters. In attributing relative significance or proportion to this consideration, we consider these factors:

- (a) The fact that those who raise it are undoubtedly tangata whenua in respect of Whaingaroa:
- (b) The unchallenged sincerity with which they urged that their cultural and traditional relationship with their ancestral water in accordance with tikanga Maori would be disrupted:
- (c) Their unwillingness to take fish and shellfish from Whaingaroa while the discharge continues, and the cultural losses following from that.
- (d) Their insistence that the discharge would undermine their ability to fulfil their kaitiakitanga obligations, denying a legacy owed to future generations.

[187] Those factors, although not necessarily decisive, require that this consideration deserves the close and careful attention described in *Watercare Services v Minhinnick*.

[188] Even so, in assessing the relative significance to be attributed to this consideration, we also take into account other factors that affect it:

- (a) The lack of a tangible basis for their attitude, in that the discharge would meet shellfish-gathering standards:
- (b) The fact that the harbour water is more contaminated from other sources:
- (c) The substantial ways in which the District Council has recognised and provided for that relationship, and for the exercise of kaitiakitanga: and



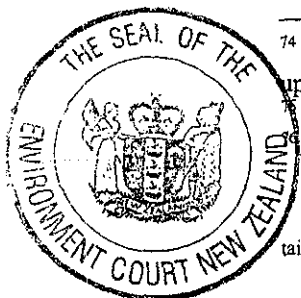
(d) The unavailability of a known feasible and affordable alternative for disposing of the wastewater from the growing town of Raglan.

[189] The discharge to the harbour, offensive to tangata whenua, disruptive to their cultural and traditional relationship with their ancestral water, and undermining their kaitiakitanga, would in those respects hinder, not enable, them to provide for their health and safety. According to tikanga, it would not sustain the potential of the harbour to meet the reasonably foreseeable needs of future generations to take fish and shellfish from it for traditional cultural purposes.

[190] We complete the metaphor by balancing the considerations on each side of the scales. The health and wellbeing of the whole community would benefit if tangata whenua are able to experience fully their cultural and traditional relationship with their ancestral water, and to exercise their kaitiakitanga. But the health and wellbeing of the whole community is at risk if the District Council is not able to provide for sanitary disposal of treated wastewater. The evidence does not reveal a feasible and affordable alternative to discharge of treated effluent to the harbour. It is our judgement that allowing such a discharge (to the high shellfish-gathering standard) would more fully promote sustainable management as defined, than would refusing consent. Refusal would at best leave the existing current sewerage system (which discharges less well treated wastewater to the harbour) to continue, or worse, to leave the community with no authorised sanitary sewerage scheme at all.

[191] It should not be inferred from that judgement that intangible considerations can never prevail over tangible considerations. In the *TV3* case⁷⁴ traditional and cultural considerations raised by Tainui Hapu prevailed. Similar considerations also prevailed in *Te Runanga o Taumarere v Northland Regional Council*⁷⁵ (another sewage discharge case), and in *Landcorp/CDL Land v Whangarei District Council*.⁷⁶

[192] The judgement we have made is dependent on compliance with the proposed conditions about the quality of the discharge, and those allowing tangata whenua to exercise kaitiakitanga (to the extent that the circumstances allow) in respect of the design of the restoration of the taniwha's lair, and in the management and contingency plans and the effects assessment. We accept the District Council's case



⁷⁴ *Tainui Hapu v Waikato District Council and TV3 Services* Environment Court Decision A75/96; upheld on appeal *TV3 Network Services v Waikato District Council* [1998] 1 NZLR 360, 371 (HC).
⁷⁵ [1996] NZRMA 77.
⁷⁶ [1997] NZRMA 322.

that there is no basis for our judgement to be influenced by the appellants' reservations about whether the conditions will be fully adhered to.⁷⁷

[193] It is sufficient for us to record, for the purpose of section 319(2) of the Act, that we have reached our judgement in reliance on full compliance with all the proposed conditions, including those about the quality of the discharge. Any non-compliant discharge of contaminants might be the subject of an enforcement order application.

Terms of consents

[194] At the appeal hearing the appellants did not seek that consent be refused altogether, but contended that the term should be limited to 5 years, to allow the District Council time to obtain consent for a wastewater scheme that does not involve discharge of effluent to the harbour.

[195] The District Council contended that a 5-year term would not be reasonable for these reasons:

- (a) The proposal is a \$3.5 million investment of public funds, which could not be justified for such a short term:
- (b) The substantial costs of having to duplicate the consent process so soon would need to be recovered in wastewater rates, which could force lower-income ratepayers out of the area:
- (c) Extensive investigation of alternatives over many years has revealed no suitable land-based disposal option, and there is no reasonable likelihood that one will be found using current technology:
- (d) Discharges from the upgraded treatment plant in accordance with the proposed conditions will not cause any significant adverse effects on the marine environment: and
- (e) The consent is subject to conditions requiring monitoring, reporting, effects assessment, and opportunities for review to ensure that compliance with the discharge parameters will be met.

⁷⁷ 88 *The Strand v Auckland City Council* [2002] NZRMA 475 (HC) para [19].



[196] Counsel for the District Council cited *PVL Proteins v Auckland Regional Council*,⁷⁸ in which previous decisions on terms of consents were reviewed, and the considerations relevant to deciding a term were summarised. By reference to that decision, the factors presented by the District Council are relevant.

[197] We accept that a term of 5 years is too short to justify the scale of investment required for upgrading the treatment plant, and to provide security of disposal for the community. The hearing of this appeal has followed prolonged consultation and expert investigation of alternatives to harbour discharge, and modifications to the proposal. That will have been costly for the community. Duplication of that cost after 5 years would be wasteful.

[198] There is no evidence indicating that a site or method of disposal without harbour discharge could realistically be expected to be discovered within 5 years.

[199] We accept the validity of the District Council's submissions summarised in subparagraphs (d) and (e) of paragraph [195]. We also accept the Regional Council's submission that this case should be distinguished from *Paokahu Trust v Gisborne District Council*⁷⁹ in which the Court granted consent for a wastewater discharge for 5 years. In that case the wastewater was to be given only primary milliscreening treatment, and was then to be discharged directly to the sea.

[200] Assessing the appropriate term of the consent in this case is not a process of calculation, but of judgement. We agree with the Regional Council's judgement (which probably was consistent with the terms of similar consents of which we are unaware⁸⁰), and we are not tempted to tinker with it. We confirm the term of 15 years.

Determinations

[201] For the reasons given, the Court determines:

- (a) Subject to item (b), the conditions of consent are amended according to the schedule produced in evidence by Mr Safey.



⁷⁸ Environment Court Decision A061/01.

⁷⁹ Environment Court Decision A162/03.

⁸⁰ To achieve Objective 12.1 of the regional coastal plan.

- (b) Proposed Condition 15 of Consent 971390 is amended by deleting the expression "10 grams per cubic metre" and substituting "20 grams per cubic metre".
- (c) Except to the extent reflected in subparagraphs (a) and (b), the appeal is disallowed, and the Regional Council's decision confirmed.
- (d) The parties are invited to present a formal order for sealing and issue that gives effect to the foregoing determinations.
- (e) The question of costs is reserved.

DATED at Auckland this 10th day of May 2004.

For the Court:



D F G Sheppard
Alternate Environment Judge



Auckland Volcanic Cones Society Inc v Transit New Zealand

High Court Auckland
10, 11, 31 March 2003
Venning and Smellie JJ

AP 123-SW02

Resource management — State highway extension — Appeal on questions of law — Effects on volcanic cone — Notice of requirement for state highway extension — Whether Environment Court erred in law — Matters of national importance — Interpretation of s 171(1)(b) — Resource Management Act 1991, ss 5-8, 92, 93, 95-103, 168, 169 171, 173, 174, 299, 300; Reserves Act 1977; Town and Country Planning Act 1977, ss 3, 4; Interpretation Act 1999, s 5; Te Ture Whenua Maori Act 1993 (Maori Land Act 1993), s 19.

AVCS, a society concerned with the protection of the remaining volcanic cones on the Auckland isthmus, lodged an appeal against an Environment Court decision in respect of a state highway extension.

The notice of requirement made by Transit New Zealand replaced an existing designation, and encroached upon the cone of Mount Roskill, but to a lesser extent. AVCS opposed the notice of requirement, and in the Environment Court sought to protect the Mount Roskill cone from the cutting into its northern face required as part of the proposed extension. It put forward alternatives to Transit's proposal, including relocation of on and off-ramps. However, the Environment Court dismissed AVCS's appeal, and confirmed Transit's decision to confirm its notice of requirement, subject to conditions.

On further appeal to the High Court, AVCS posed four questions of law. They were whether the Environment Court was in error:

- (a) in finding that although the cone was an outstanding feature and matter of national importance, those matters had to be weighed and balanced against an assessment of the effect arising from the repositioning of interchanges on the integrity of the motorway system;
- (b) in finding that it should weigh the benefits in relation to the effects upon the Mount Roskill cone to be achieved from requiring Transit to adopt AVCS's relocation proposal against the perception that this would result in cumulative adverse effects;

- (c) when considering the obligation Transit had under s171(1)(b) of the Resource Management Act 1991 to give adequate consideration to alternative methods to achieve its objective for the proposed motorway and weighing the impact of the proposed works on the Mount Roskill cone it was required to have regard to “harming the integrity of the motorway system” or in such circumstances taking the protection of an outstanding natural feature as the predominant concern in circumstances where that could not be achieved; and
- (d) in finding that the absence of an ultimate link to the state highway did not render the requirement premature in circumstances where the Court accepted that the adverse effect upon the Mount Roskill cone arising from construction of interchange ramps could only be justified if that link was developed.

Held (dismissing the appeal):

(1) While s 6 of the Resource Management Act requires matters of national importance to be recognised and provided for, that was in the context of achieving the purpose of the Act in s 5. Although a factor was not provided for by considering and then discarding it, it could not be said that the Environment Court discarded the significance of the national importance of the Mount Roskill cone. It was also clear that even if a feature such as the Mount Roskill cone was identified as of national importance, that did not of itself amount to an absolute bar to a proposed use or development. Section 6(b) itself recognises that by requiring the protection of such features from “inappropriate use and development” (see paras [27], [28] and [29]).

(2) Even if the Court disagreed with the Environment Court’s implicit finding that the state highway extension was a matter of national importance, which it did not, that would not necessarily resolve the matter in AVCS’ s favour, given that s 6(b) is subordinate to the purpose of the Act in s 5. It could not be said that the Environment Court was in error in its consideration of s 6 in the context of the Act as a whole and s 171 in particular (see paras [35] and [38]).

(3) There was no error of the second type alleged. It was incorrect to refer to the cone as being in an “unspoilt state”, as it had had a number of modifications. Those included a water reservoir, the exposed face remaining from when the road to the summit was created, various recreation areas and facilities, and a retirement complex. The Environment Court also properly had regard to more than the visual impact on the cone, hearing evidence on and discussing heritage, geological and archaeological issues in relation to it. Even so, it was not unreasonable for the Court to focus its attention on the visual effects as AVCS presented landscape evidence to it dealing with that. The time spent on the issue by the Court was consistent with its obligations under s 6(b), and with the case presented to it (see paras [45], [46], [47] and [50]).

(4) Obiter statements in *McGuire v Hastings District Council* with respect to the operation of s 171 were overstated by AVCS. The essence of those comments was that if an alternative route not significantly affecting the land at issue were reasonably acceptable, even if not ideal, then the

proposed development would not be permitted because of the importance of Maori interest under s6(e). In this case the Environment Court concluded that there were no alternative routes available and that it was not feasible or practical for the designation to be shifted. The proposed alternative methods were considered by the Court, but it determined that they were not “reasonably acceptable”. There was no error of law in that (see paras [54], [55] and [56]).

(5) Section 171 is “subject to Part II”. Neither the terms of s 171 nor statements in *McGuire* required the Environment Court to adopt that approach. Those statements, as to the strong directions in ss 6 – 8 to be borne in mind at every stage of the planning process are rather a reference to obligations on a requiring authority, the Environment Court and the High Court on appeal to have regard to those considerations. The Environment Court therefore did not misdirect itself when considering the requirement to consider alternatives under s 171(1)(b) in particular, subject to Part II (see para [59], [61]).

(6) The Environment Court directly faced AVCS’s submission that the off-ramps ought not to be built now and a decision should be made later as to their location. The approach the Court took to that issue was consistent with the application of Part II of the Act, and there was evidence before the Court that entitled it to take the view it did. There was accordingly no error of law (see paras [69], [70]).

Observation:

Whether a proposed development in each case satisfies the purposes of the Act after recognising and providing for s6 matters will be a question of fact and degree involving the exercise of broad judgment by the Environment Court, which is a specialist Court (see para [40]).

Cases referred to in judgment

Bleakley v Environmental Risk Management Authority [2001] 3 NZLR 213

Countdown Properties (Northlands) Ltd v Dunedin City Council [1994] NZRMA 145

Environmental Defence Society Inc v Mangonui County Council [1989] 3 NZLR 257

McGuire v Hastings District Council [2001] NZRMA 557 (PC)

New Zealand Rail Ltd v Marlborough District Council [1994] NZRMA 70

Ngai Tumapuhiaarangi Hapu Me Ona Hapu Karanga v Carterton District Council (High Court, Wellington AP 6/01, 25 June 2001, Chisholm J)

Watercare Services Ltd v Minhinnick [1998] NZRMA 113

Appeal

This was an appeal against a decision of the Environment Court dismissing an appeal on a notice of requirement in relation to an extension to the state highway.

P Cavanagh QC and J D Young for Auckland Volcanic Cones Society Inc

S M Janissen and T A Finlay for Transit New Zealand

R B Enright, P H Mulligan and J F Verry for the New Zealand Railways Corporation

VENNING AND SMELLIE JJ. [1] The appellant, Auckland Volcanic Cones Society Inc, (“AVCS”), appeals against a decision of the Environment Court delivered on 18 October 2002. In its decision the Environment Court dismissed an appeal by AVCS against a notice of requirement confirmed by Transit New Zealand (“Transit”) in relation to an extension to the motorway corridor of State Highway 20 (“SH20”) from Hillsborough Road to Richardson Road, including a full interchange at Dominion Road.

Background

[2] AVCS is concerned with the protection of the remaining volcanic cones on the Auckland isthmus. This appeal concerns the Mount Roskill volcanic cone. The Mount Roskill cone is one of the few volcanic cones on the Auckland isthmus that remains relatively unspoilt. The Mount Roskill cone is otherwise known as Winstone Park. It has been accorded reserve status under the Reserves Act 1977.

[3] In November 2000 Transit lodged a notice of requirement for a designation for the SH20 motorway extension through the Mount Roskill area from Hillsborough Road to Richardson Road. The extension of SH20 forms part of the planned western ring route which, when completed, will provide a complete bypass of the Auckland Harbour Bridge and the central motorway system that currently passes through central Auckland. The Mount Roskill extension of SH20 is a 5.4 km stage of that western ring route. The route also includes a Manukau link to the southern motorway SH1 and a proposed link from Richardson Road/Stoddard Road through Avondale to connect with State Highway 16 (“the Avondale extension”) which is itself currently at the investigation and planning stage.

[4] A designation for a motorway extension from Hillsborough Road to Richardson Road and a rail corridor has been in place in the district plans for over 40 years. The existing designation overlays the Mount Roskill volcanic cone in part. Transit holds the rights to the designation in so far as the road corridor is concerned. Following the “buy-back” of the Auckland rail assets, the second respondent the New Zealand Railways Corporation (“NZ Rail”), has stewardship of the rights in the designation in so far as the rail corridor is concerned.

[5] Although it held rights under the existing designations Transit lodged the fresh notice of requirement for three reasons. First, it required land outside the boundaries of the existing designation to enable construction of the SH20 extension. Next both Transit and NZ Rail wished to rationalise what was described by the Environment Court as “the present tangle of overlapping designations as between the road and rail networks” to provide for rail to be located on the northern side of the transportation corridor with the road on the southern side of that corridor. Finally, the notice of requirement substantially reduced the encroachment of the designation upon the Mount Roskill cone. Although counsel did not directly concede the point, it appears likely that Transit and NZ Rail accepted they would have had significant difficulty in obtaining consent from the Minister of Conservation to an encroachment into the reserve in accordance with the original designation.

[6] AVCS opposed the notice of requirement. Once Transit confirmed the notice of requirement AVCS, together with a number of other appellants, appealed to the Environment Court pursuant to Part VIII of the Resource Management Act (“the RMA”). The appeals of all parties save for AVCS and Greenbelt Inc were settled prior to the hearing in that Court and were either withdrawn or resolved by consent orders. Greenbelt has not pursued an appeal to this Court from the decision of the Environment Court.

[7] In the Environment Court AVCS sought to protect the Mount Roskill cone from the cutting into its northern face required as part of the proposed SH20 motorway extension. AVCS did not present its case on the basis the SH20 motorway extension should not proceed at all. Rather, AVCS put forward alternatives to the Transit proposal. AVCS sought to have the western-facing on and off-ramps to and from Dominion Road shifted to May Road or, in the alternative that the west-facing on and off-ramps be deleted completely pending the completion of the Avondale extension to connect with SH16. The Environment Court found that the AVCS alternatives would bring the vertical wall associated with the cut into the northern face further away from the steeper parts of the volcanic cone, but the cone would still be affected, albeit to a lesser extent than that required by Transit’s notice of requirement.

[8] The hearing before the Environment Court ran for 15 days. In addition to evidence from Transit and NZ Rail witnesses AVCS called four witnesses. The AVCS witnesses were a member of the society, a planner, a landscape architect and a traffic engineer.

[9] In the result the Environment Court dismissed the appeals of AVCS and Greenbelt. The decision of Transit to confirm its notice of requirement was largely confirmed, subject to a number of conditions imposed by the Court.

The Mount Roskill cone

[10] The Environment Court described the Mount Roskill cone in the following way:

[28] A central natural monolith of environmental concern to all parties including Transit and the councils is the Mt Roskill cone. It is otherwise known as Winstone Park with a history dating back to the turn of the 19th Century. Once used as a quarry it was saved from further destruction by the intervention of the Winstone Family and was finally accorded reserve status. It is accepted as being an outstanding natural feature which must be protected as a matter of national importance from inappropriate use and development by virtue of s 6(b) of the RMA. Quite apart from this its historical background and its more or less original state has caused it to become a focal point for neighbourhood identity and affection. It thus assumes heritage importance. The main modification to it has been a water reservoir which was constructed on the top but fortunately in a sympathetic manner whereby it is sunk within the volcanic crater and not visible to a casual observer. Another significant modification is an exposed face created when cutting a roadway to the top. The higher reaches of the cone show visible signs of Maori occupation but neither mana whenua nor tangata whenua are opposing the motorway construction and record that they have been consulted.

[29] On the north eastern lower slopes the topography has been modified to provide for tennis courts and a croquet green. A children's playground has also been created. These lower slopes are vegetated but not with indigenous vegetation the predominant trees consisting of phoenix palms in linear configuration. A large building complex previously used as a home for the elderly lies on the northern lower slopes of the cone where the topography levels out. Generally to the north the base of the cone levels into a more or less flat area created in the past by a lava flow and this area (apart from the recreation areas and rest home buildings) is largely bereft of any structures.

Statutory framework — appeal

[11] The appeal is brought under s 299 of the RMA. It is an appeal on, in this case, four points of law. The approach to be taken to such an appeal was settled in the decision of *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145 (full Court) at p 153:

. . . this Court will interfere with decisions of the Tribunal [Environment Court] only if it considers that the Tribunal [Environment Court]:

- applied a wrong legal test; or
- came to a conclusion without evidence or one to which, on evidence, it could not reasonably have come; or
- took into account matters which it should not have taken into account; or
- failed to take into account matters which it should have taken into account.

Further:

. . . an error of law must materially affect the result of the Tribunal's decision before this Court should grant relief.

Statutory framework — scheme of Part VIII

[12] Transit gave notice of its requirement for a designation for the purposes of the SH20 motorway extension under s 168. Pursuant to s 169 the further information, public notification, submissions and hearing procedures in ss 92, 93 – 95 to 103 of the Act then applied and were followed.

[13] The Auckland City Council as territorial authority considered the notice of requirement made by Transit. The Auckland City Council then recommended to Transit that Transit confirm the requirement in accordance with s 171(2)(a). Transit advised the Auckland City Council that it accepted the recommendation. Transit's decision was subsequently notified pursuant to s 173. AVCS then brought its appeal to the Environment Court pursuant to s 174.

[14] Section 174(4) provides that the Environment Court at the appeal stage is to have regard to the matters set out in s 171. Section 171 reads:

171. Recommendation by territorial authority — (1) Subject to Part II, when considering a requirement made under section 168, a territorial authority shall have regard to the matters set out in the notice given under section 168 (together with any further information supplied under section 169), and all submissions, and shall also have particular regard to —

- (a) Whether the designation is reasonably necessary for achieving the objectives of the public work or project or work for which the designation is sought; and
- (b) Whether adequate consideration has been given to alternative sites, routes, or methods of achieving the public work; or project or work, and
- (c) Whether the nature of the public work or project or work means that it would be unreasonable to expect the requiring authority to use an alternative site, route, or method; and
- (d) All relevant provisions of any national policy statement, New Zealand coastal policy statement, regional policy statement, proposed regional policy statement, regional plan, proposed regional plan, district plan, or proposed district plan.

....

[15] The Environment Court on appeal may either:

- confirm or cancel a requirement; or
- modify a requirement or impose conditions (s 174(4)).

Preliminary matters

Ambit of the appeal

[16] AVCS raised four points on appeal from the decision of the Environment Court. The four points on appeal are set out in the notice of appeal dated 5 November 2002. They were supported by detailed grounds also set out in the notice. Both counsel for Transit and NZ Rail submitted that in his submissions in support of the appeal counsel for AVCS Mr Cavanagh QC expanded on and departed from the questions of law identified in the notice of appeal. They also objected to the submissions that Mr Cavanagh directed to the Court in his final submissions in reply to the effect that the existing designations would not permit Transit to build the SH20 motorway extension. Section 300(5) of the RMA sets out the requirements for a notice of appeal including the requirement for the grounds of appeal to be specified. We note counsel for Transit and NZ Rail's objections to the way Mr Cavanagh presented the appeal. However, we consider that his reformulation of the basis of appeal in his written submission was more in the nature of clarification and restatement than an expansion of the questions of law. In the circumstances we are prepared to accept the reformulation in Mr Cavanagh's submissions and to deal with the AVCS case on that basis. We do, however, accept the force of counsel for Transit and NZ Rail's submission that it is not appropriate to raise fresh matters in closing submissions in reply. It may be that in part at least Mr Cavanagh's submissions on that point arose in response to a question from the Court. In the light of the view we have come to, we do not consider it necessary to deal with the matter raised by Mr Cavanagh in his closing submission in any event.

The Minister of Conservation's position

[17] As noted, the Mount Roskill cone has reserve status. Counsel for AVCS submitted to the Environment Court that the Environment Court should not hear the matter at all because the question of removal of reserve status was solely for the Minister of Conservation. The

Environment Court noted that the Department of Conservation and Transit were in consultation and the results of the consultation, if approved, would result in a land swap to replace recreational facilities affected by the notice of requirement. The Environment Court concluded “it was perfectly clear that the Minister is not likely to remove reserve status unless he knows that the public work will proceed”. The Environment Court proceeded to deal with the matter on that basis. The issue was not raised by counsel for AVCS as a ground of appeal.

NZ Rail’s involvement

[18] The AVCS proposal to shift the on-ramp to May Road would require the consent of NZ Rail, the owner of the land subject to the rail designation. This issue arose toward the end of the Environment Court hearing. NZ Rail filed a memorandum in which it indicated that the present thinking was that consent would not be forthcoming. In the circumstances the Environment Court concluded that it could not consider the May Road on-ramp to be an *available* alternative under s 171(1)(b) but for completeness nevertheless considered the suitability of the proposal. Counsel for AVCS submitted in front of us that the prospect of NZ Rail requiring the land for a “mythical” railway was unlikely, and that the designation would lapse shortly. However, counsel for Transit produced a copy of the relevant part of the district plan. The designation does not lapse until 2007.

The AVCS questions of law

[19] The questions of law identified by AVCS in the notice of appeal are as follows:

- (a) Was the Environment Court in error in finding that though the Mount Roskill cone is an outstanding feature and matter of national importance by virtue of the provisions of s 6(b) of the RMA and that s 171 of the RMA is subject to Part II of the Act, that those matters had to be weighed and balanced against an assessment of the effect arising from the repositioning of the interchanges on the integrity of the motorway system?
- (b) Was the Environment Court in error in its finding that it should weigh the benefits in relation to the effects upon the Mount Roskill cone to be achieved from requiring Transit to adopt the appellant’s proposal for a relocation of the west-facing ramps at the Dominion Road proposed interchange to May Road against the perception that this would result in the four cumulative adverse effects that it has referred to in para [165] of its decision?
- (c) Was the Environment Court in error that when giving consideration to the obligation that Transit had in terms of s 171(1)(b) of the RMA to give adequate consideration to alternative methods to achieve its objective for the proposed motorway and weighing the impact of its proposed works on Mount Roskill cone it was required to have regard to “harming the integrity of the motorway system” or in such circumstances should the protection of an outstanding natural feature have been

the predominant concern in circumstances where this cannot be achieved?

- (d) Was the Environment Court in error in finding that the absence of the ultimate link to SH16 did not render the present requirement premature in the circumstances where it has accepted that the adverse effect upon the Mount Roskill cone arising from the construction of west-facing ramps at the proposed Dominion Road interchange can only be justified if that ultimate link is developed?

First question of law

[20] By way of general comment the Court has not found AVCS's original formulation of the questions of law particularly helpful. The first question of law is an amalgam of various parts of the Environment Court's decision. The difficulty with it is perhaps highlighted by the fact that Mr Cavanagh felt the need to redraw the question of law in his submissions. Mr Cavanagh submitted that the first question of law was that the Environment Court:

Failed to correctly apply s 6(b) of the Act in making its determination.

And in conclusion put it this way:

That the Environment Court misapplied s 6 of the Act in failing to give the mandatory weight to matters of national importance specified in s 6 of the Act.

[21] We deal with the question of law as rephrased by counsel in submission.

[22] Section 6 falls within Part II of the Act. The relevant part of s 6 for present purposes is s 6(b):

6. Matters of national importance —

In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance:

...

(b) The protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development.

[23] The Environment Court accepted that the Mount Roskill cone was a matter of national importance as an outstanding natural feature in terms of s 6(b). At para [4] of its decision the Court stated:

The Mt Roskill cone is an outstanding natural feature and a matter of national importance by virtue of the provisions of s.6(b) of the RMA.

[24] Mr Cavangah submitted that despite accepting the Mount Roskill cone as a matter of national importance, the Environment Court had failed to recognise and provide for it. He referred to the Court of Appeal decision in *Environmental Defence Society Inc v Mangonui County Council* [1989] 3 NZLR 257. That was a decision under the Town and Country Planning Act 1977. Section 3 of the Town and Country Planning Act provided for matters of national importance in a similar

manner to s 6 of the RMA. Mr Cavanagh noted that the use of the phrase “recognized and provided for” in s 3 of the Town and Country Planning Act was similar to the “recognise and provide for” in s 6 of the RMA and submitted that the following comments of Cooke P at p260 were applicable:

. . . the general rule made clear by Parliament, in my opinion, is that in the end the matters of national importance must carry greater weight [as opposed to regional matters].

And later:

As already noted, the Tribunal appears generally to have reviewed matters of district and national importance without taking into account the parliamentary intention (as I see it) that the national ones are more important.

[25] However, the *Environmental Defence Society* case must be read in the context of the scheme of the relevant town and country planning legislation and the issue before the Court at that time. The Town and Country Planning Act provided at s 3 for matters of national importance. It then went on to provide for matters of regional and district importance at s 4. There was a natural hierarchy in the scheme of that Act reflected in the provisions of the Act referred to by the Court of Appeal. Matters of national importance in s 3 carried greater weight than matters of regional importance in s 4.

[26] The Town and Country Planning Act did not have a section equivalent to s 5 of the RMA that identified the purpose of the Act. Section 5 appears in Part II of the RMA. Part II of the RMA provides for the purpose and principles of the RMA. The purpose of the RMA is set out at s 5. The importance of the purpose of the RMA is reinforced by s 5 of the Interpretation Act 1999. Section 5 identifies that the purpose of the RMA is to promote the sustainable management of natural and physical resources. Section 5(2) as relevant to the present case defines “sustainable management” as:

- (2) . . . managing the use, development, and protection of natural and physical resources in a way . . . which enables people and communities to provide for their social, economic and cultural wellbeing and for their health and safety while —
- (a) Sustaining the potential of natural and physical resources . . . to meet the reasonably foreseeable needs of future generations;
 - (b) . . .
 - (c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment.

[27] Section 6 then requires that in achieving the purposes of sustainable management under s 5 all persons exercising functions and powers are to recognise and provide for matters of national importance. While s 6 requires matters of national importance to be recognised and provided for, that is in the context of achieving the purpose of the RMA in s 5. Mr Cavanagh properly accepted that matters of national importance detailed in s 6 of the RMA are subordinate to the overriding purpose of sustainable management of resources as described under s 5 of the RMA.

[28] We accept, as Mr Cavanagh submitted, that one does not provide for a factor by considering and then discarding it: *Bleakley v Environmental Risk Management Authority* [2001] 3 NZLR 213. However, on a fair reading of the Environment Court decision it can not be said the Court discarded the significance of the national importance of the Mount Roskill cone.

[29] Further, it is also clear that even if a feature such as the Mount Roskill cone is identified as of national importance, that does not of itself amount to an absolute bar to the proposed use or development. Section 6(b) itself recognises that by requiring the protection of such features from “inappropriate use and development”.

[30] Next, reference can be made to the decision of Chisholm J in *Ngai Tumapuhiaarangi Hapu Me Ona Hapu Karanga v Carterton District Council* (High Court, Wellington AP 6/01, 25 June 2001). Dealing with the submission that having accepted a site was waahi tapu and an important heritage resource under s6 the Environment Court had a positive duty to satisfy itself that tangata whenua interests were met and that it failed to do so, Chisholm J stated:

This ground of appeal seems to come down to a proposition that if a site is waahi tapu and an important heritage resource then the Environment Court is under a duty to ensure that there is no further development of the site. I do not believe that this rigid proposition accurately reflects the requirements of the Resource Management Act or the District Plan.

And later:

It follows that even if s6 applies in a given situation, an application for resource consent is not necessarily doomed to failure.

And later:

I am afraid it is difficult to escape the conclusion that in this instance the appellant is pinning its hopes on an interpretation of ss 6, 7 and 8 that would confer a power of veto over an otherwise legitimate proposal. I do not believe that was the purpose of those sections or of any of them.

[31] In *New Zealand Rail Ltd v Marlborough District Council* [1994] NZRMA 70 Greig J in this Court considered the application of s6(a) of the RMA. He concluded:

The recognition and provision for the preservation of the natural character of the coastal environment in the words of s 6(a) is to achieve the purpose of the Act, that is to say to promote the sustainable management of natural and physical resources. That means that the preservation of natural character is subordinate to the primary purpose of the promotion of sustainable management. It is not an end or an objective on its own but is accessory to the principal purpose.

. . . .
“Inappropriate” subdivision, use and development has, I think, a wider connotation than the former adjective “unnecessary”.

. . . .
It is, however, a question of inappropriateness to be decided on a case by case basis in the circumstances of the particular case. It is “inappropriate” from the point of view of the preservation of natural character in order to

achieve the promotion of sustainable management as a matter of national importance. It is, however, only one of the matters of national importance, and indeed other matters have to be taken into account. It is certainly not the case that preservation of the natural character is to be achieved at all costs. The achievement which is to be promoted is sustainable management and questions of national importance, national value and benefit, and national needs, must all play their part in the overall consideration and decision.

This Part of the Act expresses in ordinary words of wide meaning the overall purpose and principles of the Act. It is not, I think, a part of the Act which should be subjected to strict rules and principles of statutory construction which aim to extract a precise and unique meaning from the words used. There is a deliberate openness about the language, its meanings and its connotations which I think is intended to allow the application of policy in a general and broad way. Indeed, it is for that purpose that the Planning Tribunal, with special expertise and skills, is established and appointed to oversee and to promote the objectives and the policies and the principles under the Act.

[32] Greig J's comments concerning s 6(a) are equally applicable to 6(b). Although Mr Cavanagh suggested they could be distinguished as there is a New Zealand coastal policy statement that provides for the coastal environment, Greig J's comments as to the approach to the interpretation of the section itself are unaffected by that. Further, it can be noted that s 6(a) refers to "preservation" which arguably may be a higher standard than the "protection" referred to in s 6(b).

[33] The essence of Mr Cavanagh's submissions on the first ground was that while the Environment Court had recognised traffic congestion was a significant issue for the Auckland region the protection of the Mount Roskill cone was a matter of national importance and s 6 required that national matters assume greater importance than district or regional matters. He submitted that in rejecting the AVCS proposals the Court must therefore have failed to properly apply s 6 of the RMA.

[34] We are unable to accept those submissions. First, it seems the Environment Court found that the SH20 motorway extension was a matter of national importance or significance. At paras [45] to [49] of the decision the Environment Court referred to the SH20 motorway extension in the context of consideration of the *New Zealand Rail Ltd* case. The Environment Court quoted a number of passages from that decision that referred to the national importance and the economy of the nation as a whole in relation to the development of a port for the export of bulk products before concluding:

[49] In essence the Court placed s 5 of the Act at the forefront and considered that that section had a deliberate openness of language about it. *Thus if the purpose of the Act on a national scale is best achieved by the implementation of a state highway link then, subject to serious consideration concerning remedial and mitigation measures, the Act does not require that any natural feature, river, wetland, or natural feature be avoided and thus permanently protected if the value of the proposed public work best achieves the purposes of the Act as set out in s 5.*[Emphasis added].

It could be taken from that part of the Environment Court decision that the Court considered the SH20 motorway extension to be a public work of national importance.

[35] Even if we disagreed with the implicit finding of the Environment Court that the SH20 motorway extension was a matter of national importance, which we do not, that would not necessarily resolve the first question in the appellant's favour.

[36] As Mr Cavanagh himself accepted s 6(b) is subordinate to the overriding purpose of sustainable management of resources as described under s 5 of the RMA. The Environment Court was required to consider whether the SH20 motorway extension met the purpose of the RMA in s 5 having regard to the meaning of sustainable management in s 5(2). Section 6 and for that matter the balance of Part II (ss 7 and 8) fall to be considered in the context of assessing whether the purpose of the RMA has been met. The wording of s 5 includes reference to the need for "people and communities to provide for their social, economic and cultural wellbeing and . . . safety". People and communities in that context must include issues at a regional or even district level as submitted by Mr Enright. This is also implicit in a number of decisions including the decision of Chisholm J in *Ngai Tumapuhiaarangi Hapu Me Ona Hapu Karanga v Carterton District Council*.

[37] The Environment Court recognised its obligation to consider Part II issues including s 6(b). The Court then referred to the *New Zealand Rail* case noting that in that case Greig J placed s 5 of the RMA at the forefront of Part II before confirming at para [51]:

Therefore, our task in this part of our decision in evaluating Part II matters against the notice of requirement proposal is to identify matters which may be of importance in terms of Part II; identify what measures have been taken to avoid remedy or mitigate adverse effects of the proposal on the environment, with particular reference to environmental matters singled out in ss 6 and 7; and then to assess whether those measures are sufficient in view of the importance of the SH20 corridor or whether the damage inflicted by the works associated with that designation will have such an effect upon Part II matters that the work should not proceed.

[38] It cannot be said in light of those passages that the Environment Court got its consideration of s 6 in the context of the RMA as a whole and its consideration of s 171 in particular, wrong. The Court was required to consider Part II matters. The Environment Court accepted, as we do, that ss 6, 7 and 8 must be considered against the stated purpose of the RMA, that of sustainable management referred to in s 5. The Environment Court considered that the SH20 motorway extension was a matter of sufficient importance that to approve the notice of requirement satisfied the purposes of sustainable management.

[39] That a s 6 matter is one of the factors to be recognised and provided for, but is not determinative was recognised by the Court of Appeal in *Watercare Services Ltd v Minhinnick* [1998] NZRMA 113:

The Court must weigh all the relevant competing considerations and ultimately make a value judgment on behalf of the community as a whole. Such Maori dimension as arises will be important but not decisive even if the subject matter is seen as involving Maori issues. Those issues will usually, as here, intersect with other issues such as health and safety: compare s 5(2) and its definition of sustainable management. Cultural wellbeing, while one of the

aspects of section 5, is accompanied by social and economic wellbeing. While the Maori dimension, whether arising under s 6(e) or otherwise, calls for close and careful consideration, other matters may in the end be found to be more cogent when the Court, as the representative of New Zealand society as a whole decides whether the subject matter is offensive or objectionable under s 314.

[40] Whether the proposed development in each case satisfies the purposes of the RMA after recognising and providing for s 6 matters will be a question of fact and degree involving the exercise of broad judgment by the Environment Court, which is a specialist Court.

[41] In the present case the Environment Court did not, as the AVCS submits make an error of law by failing to correctly apply s 6 of the RMA. After considering s 6 in the context of Part II, the Environment Court made a factual finding that:

To shift the SH20 corridor to positions beyond the present notice of requirement proposal could have horrendous consequences on businesses, industries, schools and residents who have gone about their affairs over the last 50 years in reliance upon the provisions of the District Plan. This would in our opinion be contrary to the purpose of the Act as set forth in s 5 by causing a disruption to the social, economic and cultural wellbeing of people and communities. It furthermore would not achieve a shift of the present designation protecting a future rail route. The evidence we have is that a combination of road/rail along the inner corridor is desirable in the public interest and we have absolutely no idea whether a realignment of the corridor, even if suitable to Transit, would be acceptable to NZRC.

[42] That was a finding open to the Environment Court on the evidence before it. That being so we have no jurisdiction to disturb it.

Second question of law

[43] Mr Cavanagh also again rephrased the second question of law in his written submissions. He submitted that the essence of the second question of law was that the Environment Court failed to correctly identify and acknowledge the adverse effects on the Mount Roskill cone arising from the SH20 motorway extension. He submitted that in making its assessment, the Environment Court only considered the perceived adverse visual effects on the cone by persons viewing the cone from localities in the general vicinity. He submitted that the Environment Court made no attempt to place any weight on the intrinsic values of the cone in terms of its scientific value and its place in the unique natural history of Auckland.

[44] Mr Cavanagh also submitted that the Court had failed to recognise the key adverse effects of concern to the AVCS which were the protection and preservation of the cone in its current “unspoilt state”.

[45] We are unable to accept those submissions. First it is incorrect to refer to the cone as being in an “unspoilt state”. While relatively unspoiled, the Mount Roskill cone has a number of modifications. As noted by the Environment Court they include the water reservoir, the exposed face that remains from when the road to the summit was created, the tennis courts, croquet green, recreation area and the retirement

complex. The Environment Court was plainly aware of those modifications and referred to them in its decision:

[74] . . . The tennis courts and croquet green required levelling by cutting a bench into the side of the mountain. The rest home required the construction of buildings on a levelled part of the apron. In the context of *protecting* a natural feature activities of that nature have about them a degree of expediency largely incompatible with the desire expressed by the RMA to keep such features intact. Walking paths, children's playgrounds, seats and activities of that nature are more compatible with the natural feature in that they enable people to enjoy an amenity without destruction of natural landform.

[46] Next, when the Environment Court decision is read in its entirety, it is apparent the Court had regard to more than the visual impact of the proposed motorway extension on the Mount Roskill cone. The Environment Court referred in a number of passages to the physical state of the cone and its attributes. At the introduction to consideration of the cone itself in its decision the Court stated:

[73] No-one questions the significance of the Mt Roskill Cone, it being described previously in this decision. We accept without question the importance of the volcanic structures of the Auckland isthmus and furthermore accept that they are regarded as unique in the world, forming a cluster of small volcanic cones of fairly recent geological origin. Most have been interfered with in one way or another and some have been totally destroyed. It is therefore important in terms of the RMA that Mt Roskill, one of the relatively unspoilt examples of this past history and activity, be protected as required by the RMA from inappropriate use and development.

[47] The Court heard evidence on and discussed in its decision heritage, geological and archaeological issues in relation to the Mount Roskill volcanic cone. We note that the geological and archaeological issues were addressed by witnesses for the requiring authority Transit rather than the AVCS. The Environment Court also considered the importance of the cone to Maori. At para [80] of its decision the Environment Court said:

We also heard evidence concerning the heritage value of Winstone Park . . . Combined with that heritage value is its value as a tangible sign of occupation by the Maori people and as an example of pre-European ancestral land holdings. We record, however, that the Maori people have been consulted and do not seek any orders from this Court concerning the motorway construction other than conditions relating to the finding of taonga or koiwi.

[48] Reference can also be made to the Court's statement at para [109] where it noted:

[109] At this point in our deliberations we find that with the exception of matters relating to the visual *and physical integrity* of the Mount Roskill cone there is nothing in Part II of the Act which would preclude us from moving to an assessment of the balance of the matters contained in s. 171 of the RMA. [Emphasis added.]

[49] It is apparent that the Court considered the physical integrity of the cone in addition to the visual effects.

[50] Finally, it was not unreasonable for the Environment Court to focus its attention on the visual effects of the SH20 motorway extension in its decision as the AVCS presented landscape evidence to the Court dealing with that very aspect. That the Court spent some time dealing with those issues was consistent with the Court's obligations under s 6(b) and was also consistent with the way the case was presented to it. However, it is apparent from the passages in the Environment Court's decision that it had regard to the physical and other intrinsic values of the cone as well.

The third question of law

[51] Mr Cavanagh also restated and clarified the specific error of law alleged in relation to the third question. He submitted that in considering the application of s 171(1)(b) the Court read down the pre-eminence of Part II of the RMA and that the Court concluded and was wrong to conclude, that on a consideration of alternatives Transit was entitled to give greater weight to the integrity of the SH20 motorway extension than to the protection of the cone. He submitted that the assessment of alternatives required under s 171(1)(b) in particular must be undertaken by reference to Part II of the Act (particularly the matters provided for under s 6, and that the Environment Court should have directed that the predominant concern was protection of the cone as an outstanding natural feature of national importance and in failing to do so the Court had committed an error of law. Mr Cavanagh referred in particular to a decision of the Privy Council in *McGuire v Hastings District Council* [2001] NZRMA 557.

[52] In *McGuire* the district council proposed to issue a notice of requirement for a designation for a road to run through Maori land near Hastings. The appellant sought and obtained an interim injunction from the Maori Land Court to prevent the council from issuing a notice of requirement to enable further discussion between the parties. The grounds for the injunction were that the proposed designation could represent a trespass or other injury to Maori freehold land under s 19(1)(a) of the Te Ture Whenua Maori Act 1993. The council sought judicial review of the Maori Land Court's decision claiming the Maori Land Court lacked jurisdiction to issue an injunction against the council in those circumstances. The Maori Land Court's decision was quashed by the High Court. The order quashing the decision of the Maori Land Court was upheld on appeal. On appeal to the Privy Council the Privy Council considered the relevant provisions of Part VIII of the RMA including s 171. Delivering the advice of Their Lordships, Lord Cooke of Thorndon said:

By s 171 particular regard is to be had to various matters, including (b) whether adequate consideration has been given to alternative routes and (c) whether it would be unreasonable to expect the authority to use an alternative route. . . . Note that s 171 is expressly made subject to Part II, which includes ss 6, 7 and 8. This means that the directions in the latter sections have to be considered as well as those in s 171 and indeed override them in the event of conflict.

Earlier Lord Cooke of Thorndon had stated:

[21] Section 5(1) of the RMA declares the purpose of the Act is to promote the sustainable management of natural and physical resources. But this does not mean that the Act is concerned only with economic considerations. . . . The Act has a single broad purpose. Nonetheless, in achieving it, all the authorities concerned are bound by certain requirements and these include particular sensitivity to Maori issues. By s 6, in achieving the purpose of the Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for various matters of national importance, . . . These are strong directions, to be borne in mind at every stage of the planning process . . . Thus, for instance, their Lordships think that if an alternative route not significantly affecting Maori land which the owners desire to retain was reasonably acceptable, even if not ideal, it would accord with the spirit of the legislation to prefer that route. So, too, if there were no pressing need for a new route to link with the motorway because other access was reasonably available.

[53] Strictly speaking the observations of Lord Cooke of Thorndon in relation to the operation of s 171 were obiter dicta. Nonetheless they are very strong obiter dicta. Neither counsel for Transit nor NZ Rail sought to suggest that the comments were wrong as a matter of principle. Rather they submitted that Lord Cooke of Thorndon was doing no more than restating the primacy of Part II of the RMA which has long been accepted by the Court and that the Environment Court had properly considered Part II issues when considering s 171 of the RMA.

[54] With respect to Mr Cavanagh's submission in our view he overstated the significance of the obiter comment of Lord Cooke in the *McGuire* decision. The essence of Lord Cooke of Thorndon's obiter comment was that if an alternative route not significantly affecting Maori land were reasonably acceptable even if not ideal or if there was no pressing need for the new route because other access was reasonably available then the proposed development would not be permitted because of the importance of Maori interest under s 6(e). In the present case the Environment Court concluded that there were no alternative routes available and that it was not feasible or practical for the designation to be shifted. Those findings are set out in paras [116], [118] and [119] as follows:

[116] The next limb is s171(1)(b) as to whether adequate consideration has been given to alternative sites, routes, or methods of achieving the public work or project or work; . . . We do not need to address this at any length. A roading corridor has been created and protected in more or less the same position for some half a century. As a result of the identification of the roading corridor urban development has taken place on both sides. Development has been inhibited within the corridor by reasons of protective mechanisms applying within its boundaries. This will facilitate the construction of the motorway with minimal disruption to the public caused by compulsory acquisition of land. Those adjacent to the corridor will find a change in their amenity values but that is a change which cannot be said to be unexpected. The exception to that statement would be those resident in Maioro Street, Stoddard Road and Sandringham Road where land is designated as road for access to and/or for state highway/motorway purposes

use of those roads being necessary to allow for the connection of the proposed motorway to the local roading network and for future grade separation between road and rail. Nevertheless residents in that area and in particular in Maioro Street have had the expectation of being faced with an arterial as a result of the provisions of the Auckland Isthmus Plan.

[118] In relation to alternative sites or routes we are fully satisfied that there are no available alternatives which can realistically be considered at this time. A shift of the corridor to the south is completely out of the question because of the existence of the Mount Roskill cone. Any shift to the north would be impossible without embarking upon further requirement procedures. That would bring the motorway corridor into settled communities including schools and businesses. It would affect one church which the community considers of importance and which is presently poised on the northern boundary of the NOR as presently proposed.

[119] Therefore, despite the fact that this corridor was envisaged more or less on this alignment in the decades preceding the RMA we are of the opinion that the provisions of s 5 of the RMA concerning the sustainable management of the present community resources represented by housing, schools, churches, parks etc should in this instance be applied so as to enable the people and communities of the Mount Roskill area to provide for their social, economic and cultural well-being. Those resources should be sustained to meet the reasonably foreseeable needs of future generations without having the unexpected advent of a motorway in their midst. Those directly affected by the proximity of the NOR have been fully consulted and that consultation is ongoing.

[55] As is apparent from the above, sustainable development was considered (s 5) and a conclusion reached as a matter of fact and degree that the limited intrusion involved into the toe of the cone was not, in terms of s 6(b) an inappropriate use or development. There was no error of law in that. It was a conclusion well open to the specialist Court in all the circumstances.

[56] The Court considered the proposed alternative methods of providing for the designation by shifting the ramps to May Road or postponing their construction. The Court had found a need for the SH20 motorway extension. It also considered that there would be some effect to the Mount Roskill cone even under the AVCS proposed alternatives and effectively found that the AVCS proposed alternatives were not “reasonably acceptable”. That finding is implicit in its rejection of them. It must also be considered in the context of the Environment Court’s finding that the May Road on-ramp was not an available alternative.

[57] Even on the AVCS submissions aspects of the Mount Roskill cone were going to be affected. The alternatives before the Court really were how much it would be affected and whether the AVCS proposals were in the words of Lord Cooke of Thorndon “reasonably acceptable even if not ideal”. That also was a judgment that the Environment Court was properly able to make.

[58] The Environment Court considered all relevant factors including the AVCS submissions. It rejected the alternatives either as not available or not reasonably acceptable. In light of its consideration and analysis it cannot be said that the findings it made were not open to it.

[59] The matter can be considered another way. The specific considerations in s 171 (alternative methods or routes in particular) are subject to Part II of the RMA. Parties involved in the administration and application of the RMA are very familiar with the requirement to have regard to other considerations subject to Part II. On an application for resource consent, consent authorities and on appeal the Environment Court must have regard to the considerations in s 104 of the RMA. The s 104 considerations are expressed to be subject to Part II. There is a well-established body of case law confirming the primacy of Part II and how that is applied in relation to the s 104 considerations. The drafting technique used in s 171 to provide the considerations in that section are subject to Part II is not unique to s 171.

[60] In the present case the effect of ss 171 and 174 is to require Transit and the Environment Court on appeal to have particular regard to the matters at s 171(1)(a),(b),(c) and (d) but always subject to Part II of the RMA.

[61] Mr Cavanagh submitted that when having regard to s 171, at each stage of consideration of s 171, the Court ought to test each alternative against Part II. We do not read s 171 nor the comments of Lord Cooke of Thorndon in the *McGuire* case as requiring the Court to adopt that approach. Lord Cooke of Thorndon's reference to the strong directions (in ss 6 – 8) to be borne in mind at every stage of the planning process is a reference to the obligations on a requiring authority, the Environment Court and this Court on appeal to have regard to those considerations. For the reasons given earlier we are satisfied the Environment Court did not misdirect itself when considering the requirement to consider the alternatives under s 171(1)(b) in particular, subject to Part II. The Environment Court addressed those issues in its decision. At para [42] of the decision it noted under a heading "Part II of the RMA":

We will commence our consideration of this matter with reference to the public work itself (setting aside the resource consents for the construction period granted by the ARC) in terms of s 171 of the RMA. We will first consider the Part II issues to which that section is subject and then move to a consideration of the limbs of s 171.

[62] The Environment Court was not in error in approaching the matter in that way.

Fourth question of law

[63] Mr Cavanagh again rephrased the fourth question of law in his written submissions. He submitted that it essentially related to the conflicting findings of the Environment Court that on the one hand:

- the proposed effects on the Mount Roskill Cone could only be justified if the ultimate link between the proposed SH20 motorway extension and SH16 was developed.

but on the other hand:

- the absence of a designation or firm plans for the Avondale link did not render the present requirement premature.

[64] He submitted that the protection of the cone had been demoted to secondary status in the Court's analysis and that such was wrong at law.

[65] The first point to be made is that the first leg of Mr Cavanagh's argument was not an express finding of the Court as such. What the Court did say at para [140] of its decision was:

Until SH20 is extended beyond Maioro Street to link up with the north-west motorway, traffic volumes on these ramps *taken in isolation* would not be sufficient to justify interference with a feature deemed to be of national importance by virtue of the RMA [Emphasis added.]

[66] As Mr Enright submitted the Court took a robust approach towards the future intended linkage with the Avondale section of SH16. The Court accepted that the prime purpose of the notice of requirement before it and the SH20 motorway extension was to connect SH20 to the north-western motorway and there was a commitment to complete the linkage. Reference can be made to the following passages of the Environment Court's decision:

In that regard the Auckland Regional Land Transport survey prepared by the ARC and Transit State Highway Strategy confirms a clear commitment to complete construction of the western ring route connecting the southern motorway through to join the north-western motorway SH16 within 10 years.

[67] The Court had AVCS's submission that the absence of the ultimate link to SH16 rendered Transit's notice of requirement premature as the whole length of the linkage should be considered by the council, the requiring authority and the Court as one package (para [10] of the decision) before it but rejected that proposition for two reasons, namely:

- (a) That a requiring authority is entitled to have its requirement [in the terms which it has chosen] dealt with in terms of the RMA. It is under no obligation to extend the ambit of the requirement at the behest of submitters.
- (b) That it is perfectly open to a requiring authority to ascertain in terms of the RMA whether a particular stage of development is acceptable before committing funds to a subsequent stage.

[68] The Environment Court dealt with the application before it on the basis that the western ring route would ultimately be constructed and the on and off-ramps in issue would be required. The Court therefore considered that provision had to be made for on and off-ramps in the course of the present design planning:

[140] . . . If it be found that the Dominion Road interchange is likely to be required in the future as a necessary component of future motorway linkages, then it would be foolhardy in the extreme to ignore that issue.

And:

[142] . . . it would be desirable at this stage to feed traffic into main arterials if that is at all possible, thus producing a traffic pattern which will last into the future.

[69] The Court directly faced AVCS's submission that the Dominion Road off ramps ought not to be built now and a decision should be made

later as to whether they were to be sited at May Road or Dominion Road once the Avondale link was completed. The Court said in relation to that submission:

In respect of that second alternative it is our opinion that the decision must be made now. It would be both expensive and undesirable to disrupt the motorway by engaging in massive earthworks a short time after the opening of the SH20 link. . . . We must therefore look at the matter as part of a long-term strategy and decide at this stage of the design process where the interchange should be located.

[70] The approach the Court took to this issue was consistent with application of Part II of the RMA. The Court accepted the significance of the Mount Roskill cone as a feature of national importance, but considered that in terms of sustainable management under s 5 of the RMA, that it should take a long-term view and be cognisant of the likelihood (indeed overwhelming probability) that the SH16 link would be completed. There was evidence before the Court which enabled the Court to take that view. It can not be said the Court erred in law in regard to that.

Result

[71] The appeal is dismissed.

Costs

[72] Costs are reserved to be dealt with by memoranda if necessary.

ORIGINAL

Decision No. W109/94

IN THE MATTER of the Resource Management Act
1991

AND

IN THE MATTER of an appeal under section 120 of
the Act

BETWEEN THE MEDICAL OFFICER OF
HEALTH

(Appeal: RMA 145/93)

Appellant

AND

CANTERBURY REGIONAL
COUNCIL

Respondent

AND

RAVENSDOWN FERTILISER
CO-OPERATIVE LIMITED

Applicant

BEFORE THE PLANNING TRIBUNAL

His Honour Judge A A P Willy presiding
Mrs N J Johnson
Mrs R Grigg

HEARING at CHRISTCHURCH on the 8th, 9th and 10th days of August 1994

APPEARANCES

Mr J L Woodward for the appellant
Mr G L Wenning for the respondent
Mr N S Marquet for the applicant
Mr J Walsh for the Hornby School



ORIGINALDECISION OF TRIBUNALThe Appeal

This is an appeal by the Medical Officer of Health against a decision of the Canterbury Regional Council granting a discharge permit to the applicant. The notice of appeal is dated 14 April 1993 and must therefore be dealt with pursuant to the provisions of the Resource Management Act as they stood before the 1993 amendment.

Procedurally this matter has followed a tortuous course. In the original appeal document the appellant sought variations of the consent in a number of specified ways. In order to facilitate the narrowing of issues His Honour Judge Skelton convened a number of meetings between the parties and raised with Mr Woodward, counsel for the appellant, the possibility that on one view of the matter what the appellants were seeking was in effect a cancellation of the resource consent.

On 19 February 1994 Judge Skelton noted the file as follows:

"By consent application to amend notice of appeal granted accordingly. Amended notice of appeal to be served on applicant since respondent has already filed a reply to the amended notice of appeal on 13 May 1994 no further directions are required. This matter is now ready for a hearing."

It seemed that Mr Woodward reflected upon that matter and following a further meeting between counsel and the Judge held on 24 March 1994, His Honour recorded the following:

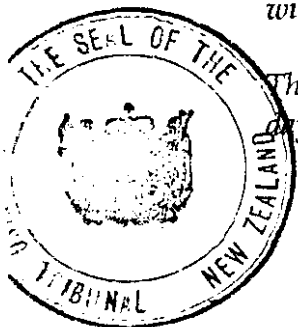
"2. Mr Woodward, counsel for the appellant, informed me that the appellant now intends to oppose the application for consent to discharge contaminants into the air that is the subject of these proceedings in its entirety and a fixture will be required accordingly:- ..."

His Honour further recorded that it would be necessary for the appellant to file an amended notice of appeal and noted:

"On the basis that the original application for the discharge permit is to be contested in its entirety, Mr Marquet advised that the applicant would be calling four or five witnesses and his case would take at least one day.

The case for the Canterbury Regional Council will be supported by one witness and will take approximately half a day.

The appellant is to call three witnesses and his case will take approximately one



Following that meeting on 25 March 1994 the appellant filed an amendment to his notice of appeal. Paragraph 7 of which reads:

"The relief sought by the appellant is that this appeal be allowed and:

- a. *That the permit to discharge contaminants to air granted to Ravensdown Fertiliser Co Limited be cancelled.*
- b. *That any replacement permit.*
 - i. *Be for a period not exceeding five years.*
 - ii. *Inter alia contain conditions which require:*
 - a. *Ravensdown Fertiliser to record stack emissions and emissions from all other parts of the premises,*
 - b. *Allow access by the Canterbury Regional Council officers to verify the recordings,*
 - c. *Set measurable limits for the chemical emissions.*
 - iii. *Contain further conditions requiring Ravensdown to contribute to the measurement of ambient levels of emitted gases at sites in the receiving environment.*
 - iv. *Contain a further condition that the conditions of the consent be reviewed annually for the purpose inter alia to deal with any adverse effect on the environment which may arise from the exercise of the consent which have become apparent as a result of monitoring in the receiving environment."*

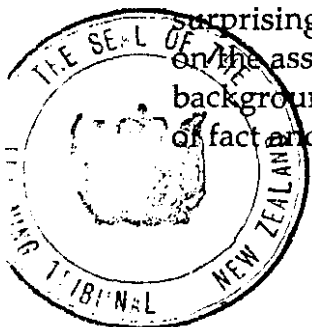
On 25 March 1994 in an accompanying memorandum for His Honour Mr Woodward said at paragraph 3:

"The amendment to the notice of appeal para. 7 attached to the application for directions filed in this matter has been prepared to clarify the extent of the issues to be canvassed. It is the appellants contention that the grant of the discharge permit is in issue."

Mr Marquet for the applicant and Mr Venning for the Regional Council both prepared their respective cases on this basis.

During the course of Mr Marquet's opening we raised with Mr Woodward whether or not the appellant wished to put the consent in issue in its entirety. Mr Woodward indicated to the Tribunal that in fact he did not and that all the Tribunal would be called upon to decide were questions relating to appropriate conditions. Both Mr Marquet and Mr Venning expressed immediate and visible surprise at this significant departure from the appellant's stance as recorded in the foregoing minutes.

Notwithstanding that indication from counsel for the appellant, Mr Marquet, not surprisingly, called all the evidence which he had prepared on behalf of his clients on the assumption that the granting of the consent was in issue. It is against that background that we now deal with the amended notice of appeal and the matters of fact and law relevant to it.



Matters of FactBackground Matters Relating to the Applicant's Activities

Mr J L Anstey the manager of the Hornby works of the applicant company told us that the fertiliser works is established at 312 Main South Road, Hornby. The works were built for the purpose of manufacturing sulphuric acid and superphosphate and for the storage and dispatch of superphosphate and other fertilisers to the surrounding farming regions. The works commenced production in 1922 and had carried out these operations on the present site now for a total of 72 years. The site was originally chosen and developed with the support of the then local council. The area was zoned for heavy industrial and noxious industrial use and was surrounded by similarly zoned areas as well as a rural belt of land to the south side of the Main South Road. There was then no residential development in the area.

The company's factory is established on a site of some 13.56 hectares and is conveniently located for access to major highways and the Port of Lyttelton. It also enjoys the benefit of its own rail siding. Mr Anstey says:

"The present site is the best available and occupation for the present purposes must therefore be considered permanent. ...

The current zoning of the site is Industrial 3 with the exception of a 30 metre wide boundary strip along the Main South Road being zoned Industrial 1."

We were told this was intended at the time to act as a buffer between the sort of activity carried on by the applicant and less noxious industries and other uses permitted in the area.

The original plant and buildings have been upgraded on several occasions to ensure that the plant and methods of production are among the most modern available. This enables the plant to run efficiently with capacity to meet future demand. The current replacement cost of the present buildings and plant is approximately \$56m. The original lead chamber process acid plant was replaced in 1967 with the present "contact plant". Anti-pollution devices have been modified and upgraded on a number of occasions.

At present the factory produces primarily superphosphate fertiliser. This contains 9% phosphorus as phosphate and 11% sulphur as sulphate. The product is of course used widely in the agricultural and horticultural industries throughout the South Island. Mr Anstey tells us that most soils found in the South Island lack both phosphorus and sulphur in the required quantities to sustain adequate levels of production. The fertilisers produced at the plant are therefore crucial to sustained agricultural production in this part of New Zealand. The works also manufactures what is described as maxi and longlife fertilisers which have higher proportions of sulphur and phosphate respectively.



A wide variety of raw fertilisers are imported to enable the works to offer a complete range of plant nutrients. These imported fertilisers complement the superphosphate produced at the works. In Mr Anstey's view having regard to the nature of the soils in much of the South Island he foresees that the manufacture of superphosphate will continue to be the major activity undertaken at the Hornby works.

Fertiliser Output

Output for the period 1986 to 1994 has ranged from a low of 69,302 tonnes in 1988 to a high of 94,066 tonnes in 1994.

The Plant and Processes Undertaken

At present the factory employs a total of 41 people. Sulphuric acid is manufactured by what is described as a contact process and superphosphate by the continuous Broadfield process. The sulphuric acid plant has a rated capacity of 250 tonnes of acid per day and this is sufficient to support a total output of 230,000 tonnes of fertiliser per annum. It takes 36,700 tonnes of acid to produce the 94,066 tonnes of superphosphate which was in fact produced in 1994. Current daily production of sulphuric acid is in the vicinity of 145 tonnes per day.

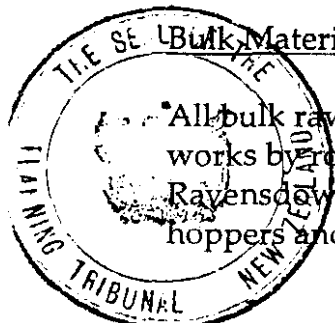
The manufacture of superphosphate involves the mixing of sulphuric acid with finely ground rock phosphate. There are no solid wastes or by-products from this process. However the phosphate raw material contains a small percentage of fluorine. A fraction of this fluorine is evolved as the gas, silicon tetrafluoride, which is passed through a scrubbing system where it is absorbed in water. The mixing of the acid and phosphate rock takes place in a device called a Broadfield den. This den is capable of operating 20 hours per day with an output rate of 57 tonnes per hour matching the present acid production output.

Since its establishment the works at Hornby has undergone modification or replacement of almost all parts of the plant and in some cases, more than once. For many years the operations of the company has been subject to scrutiny by chemical inspectors of the Department of Health working under regulations most recently embodied in the Clean Air Act 1972. The applicant currently has a licence under that Act which by virtue of the provisions of the Resource Management Act remains current until 1 October 1994.

We heard considerable evidence from Mr S A Clark, group technical manager of the applicant company relating to the detail of the manufacturing process. In summary he said:

Bulk Material Intake

All bulk raw materials and imported fertilisers are transported to the fertiliser works by road transport either from the Port of Lyttelton or from other Ravensdown Fertiliser works. The materials are discharged into below ground hoppers and then conveyed by covered belt conveyors to the appropriate storage



buildings. The materials received into the plant include phosphate rocks, sulphur, ammonium sulphate, diammonium phosphate, potassium chloride and various granulated fertilisers. All of the materials except for the phosphate rocks have been granulated, prilled or formed in some way to reduce dust.

Sulphuric Acid Plant

The witness describes this plant as ranging from 98.5 - 99.1% efficient by which is meant that the plant discharges at a maximum 1.5% of its product as wastes. The discharge is further cooled then contacted by 98.5% sulphuric acid in the absorbing tower. The sulphur trioxide is absorbed in the sulphuric acid increasing its concentration. Water is added to this sulphuric acid restoring its concentration to 98.5%. The remaining gas consists principally of nitrogen and oxygen but also contains up to 0.12% of sulphur dioxide by volume and traces of sulphur trioxide and acid mist. The gas passes through high efficiency mist eliminators and is then discharged to the atmosphere via a 42 metre high stack.

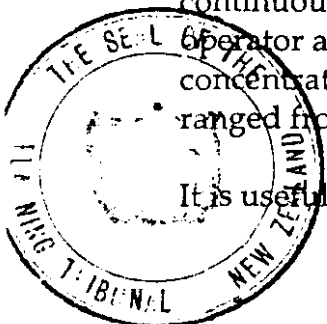
The phosphate produced at the plant is granulated and conveyed by covered conveyor belt to storage where it remains for a minimum of ten days while the chemical reaction is completed. In the course of the reaction a number of volatile compounds are produced. These include carbon dioxide, water vapour, silicon tetrafluoride, sulphur dioxide, hydrogen sulphide and various organic sulphur compounds. These gases are collected and scrubbed with water and caustic soda to remove the contaminants prior to discharge to the atmosphere through a 31 metre high stack.

Sulphuric Acid Plant Discharge

The witness then deals in detail with the nature of the discharges and the measures taken to control them. First the sulphuric acid plant. The discharge from this plant contains up to 0.12% sulphur dioxide by volume and up to 50mg/m³ of acid mist and sulphur trioxide. The resulting steam, together with hydrogen sulphide produced during the melting of the sulphur is given off as a moisture which escapes from the sulphur melter. The resulting gas is subject to temperature reduction which produces steam. This is used as a by-product for the generation of electricity within the plant and for on-sale of a significant amount to the local electricity supply authority.

The discharge of sulphur dioxide is controlled by ensuring that the temperatures of the gas stream entering each catalyst bed is optimal. In this way the conversion of sulphur dioxide to sulphur trioxide is maximised. The sulphur dioxide concentration in the gas stream discharged from the plant is recorded continuously by infrared spectroscopy and determined manually by the plant operator at two-hourly intervals. For the period February 1993 to July 1994 the concentration of sulphur dioxide in the gas stream discharged from the acid plant ranged from 0.06% to 0.16% by volume with a mean value of 0.09%—

It is useful to compare these figures with the levels of discharge permitted in the



Clean Air Licence previously referred to. It provided that:

"The concentration of sulphur dioxide is not to exceed at any time 0.18% by volume at all loads. The concentration shall be monitored continuously using an appropriate instrument."

The discharges of this substance for the 1993/1994 year are therefore well within the limit set by the Regional Air Pollution Control Officer in granting the licence under the Clean Air Act.

The discharge of sulphur trioxide is controlled by ensuring optimal concentration and temperature of the absorbing acid. An acid mist is formed in the plant when moisture in the gas stream reacts with the sulphur trioxide. This is routinely checked by the works' laboratory. The company has installed "candle filters" to remove acid mist from the gas stream. The removal efficiency is approximately 100% for particles larger than three micrometres and ranges from 92 to 99.95% for particles smaller than three micrometres. The witness says that the gas discharged from the plant is essentially free of acid mist. The emission standard for acid mist in the Clean Air Licence is:

"100 milligrams per cubic metre as sulphur dioxide corrected to 0° Celsius 1 atmosphere pressure and a dry gas basis 15 minute average."

The conversion is to be:

"not less than 98.5% at all loads at any time".

The witness describes the terms of the licence when compared with the discharges in this way:

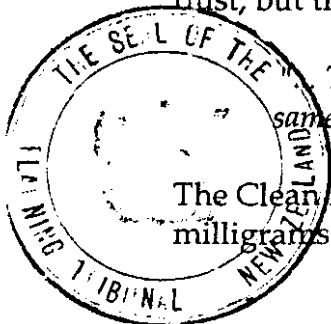
"... The Hornby plant is equipped with equivalent candle filters and the discharge of acid mist would be similar to that at the Ravensborne plant. The current clean air licence permits the acid mist concentration to range up to 50 mgm³."

It is not clear whether the witness is there referring to the Ravensdown plant or the Hornby plant but in any event the evidence establishes that the company operates within the parameters set for this discharge by the Clean Air Licence.

As previously indicated hydrogen sulphide is produced from the sulphur melters and molten sulphur tanks. In March 1993 the company installed a soil filter which is designed to remove significant quantities of hydrogen sulphide. This has not yet worked to full efficiency because of blocking of the filter medium by sulphur dust, but the witness says:

"This will be remedied by the installation of a device successfully utilised in the same application at the company's Ravensborne's works."

The Clean Air Licence requires that hydrogen sulphide levels not exceed 100 milligrams per cubic metre. Having regard to the witness' evidence it is not clear



whether or not he is aware of this level or whether or not the company has been exceeding it.

Dust

Dust is produced when phosphate rock is ground. The only discharge produced from the grinding plant is the moist air vented from each of the two mills to control the humidity of the air. Phosphate rock suspended in the air vented from the mills is removed by reverse pulse jet bag filters. The removal efficiency is 100% for particles larger than 5 micrometres and typically 95 to 99+ % for particles smaller than 5 micrometres. The witness says that recent tests on dust concentrations in the air discharged from the bag filters ranges from 22 to 157 milligrams/actual metres. The Clean Air Licence allows for an emission standard of 250 milligrams per cubic metre at 0° Celsius and 1 atmospheric pressure. The discharge of dust therefore is well within the standard set by that Clean Air Licence.

Fluoride

The concentration of fluoride gas discharged from the plant is well within the ranges allowed by the Clean Air Licence. It is from 0.7 to 12.8 milligrams per cubic metre with a mean value of 8 milligrams per cubic metre. The standard set in the Clean Air Licence is 50 milligrams per cubic metre.

In evaluating these figures it must be kept clearly in mind that the applicant company has the potential to be a substantial polluter notwithstanding that it is currently operating well within the requirements of the existing Clean Air Licence. That is so because it is currently discharging 2,448 kilograms of sulphur dioxide into the atmosphere per day. Conscious of that, the applicant is considering a number of steps designed to reduce the discharge of sulphur dioxide. These include:

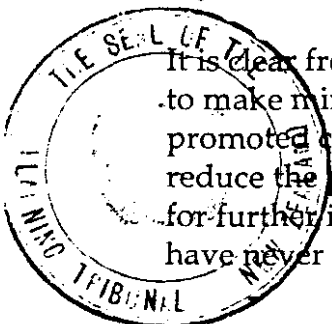
"... Double contact/double absorption, caesium promoted catalyst, feed modulation, tail gas scrubbing."

By this combination of processes the applicant says:

"The conversion of sulphur dioxide can be increased to typically 99.5%."

To further improve this figure the applicant would need to spend approximately \$3m on the installation of more sophisticated anti-pollution devices. The witness says that this level of expenditure would be uneconomic in this plant.

It is clear from the evidence that very large sums of money would need to be spent to make minor improvements in the emission standards. For example the cesium promoted catalyst would cost some \$220,000 every 20 years and would only reduce the pollution rates from 98.5 to 98.7%. There exist other theoretical models for further improving the emission standards but as far as the witness knows these have never been used commercially in a sulphuric acid plant. From his knowledge



and experience the witness says that in the context of a 27 year old plant an operating conversion rate of 98.5% must be regarded as the best practicable option.

That was the position concerning the applicant's factory as at the time of its application. The Canterbury Regional Council heard the application and all of the evidence which the parties and submitters wished to call. It concluded that the application should be granted subject to a number of conditions, among other things, setting maximum levels of discharge of pollutants, in particular the sulphuric acid plant stack. The condition requires that the discharge of sulphur compounds shall not exceed 1.5% of the sulphur burned and the concentration of sulphur dioxide shall not exceed 0.13% at any plant load. That represents a reduction from that permitted by the Clean Air Licence of 0.05%. There are further conditions relating to emission levels during plant start up. Insofar as dust is concerned the Council specified that the concentration of dust in the discharges from the mill vents shall not exceed 250 milligrams per cubic metre. That is the same standard required in the Clean Air Licence.

As to the superphosphate plant stack, the Council required that the concentration of fluoride in the discharge from the den scrubber stack shall not exceed 70 milligrams per cubic metre. That represents a higher figure than that permitted by the Clean Air Licence and further provided that the total emission of hydrogen sulphide in the discharge from the den scrubber stack shall not exceed 70 milligrams per cubic metre. That is a reduction of 30 milligrams per cubic metre when compared with the Clean Air Licence.

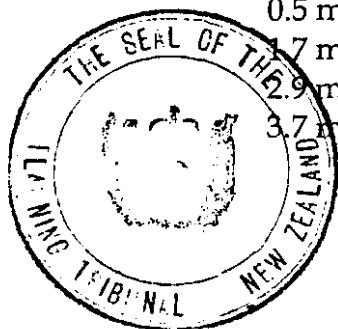
It is therefore clear that with some obvious amendments the Council has generally considered that emission standards set in the Clean Air Licence can safely be relied upon in the present circumstances. In coming to that conclusion the Council had regard to what were then proposed ambient air quality guidelines put out by the Ministry for the Environment. Since the date of the Council's hearing those guidelines are no longer proposed. They have now been published in what we understand to be an amended form. They are as follows:

Sulphur dioxide

50 micrograms per cubic metre annual mean
 125 micrograms per cubic metre 24 hour mean
 350 micrograms per cubic metre 1 hour mean
 500 micrograms per cubic metre 10 minute average

Fluoride

0.5 micrograms per cubic metre 3 month average
 1.7 micrograms per cubic metre 7 day average
 2.9 micrograms per cubic metre 24 hour average
 3.7 micrograms per cubic metre 12 hour average



Hydrogen sulphide

7 micrograms per cubic metre 1 hour average

It is thus clear that in the case of the major pollutant, sulphur set by the Council not to exceed 10 kilograms per tonne of acid produced and which is equivalent to the 98.5% conversion required by the current Clean Air Licence is below the levels proposed by the Ministry for the Environment guidelines for ten minute, one hour and 24 hour sampling periods. It is also true that the annual mean levels are not exceeded. Indeed for the most part the figures establish that the emissions were significantly below those recommended in the Ministry for the Environment guidelines.

In addition to actual testing at the four sites referred to, the applicant company has engaged in extensive computer modelling of likely pollution discharge rates. For this it has adopted what we are satisfied is an internationally acceptable modelling programme known as AUSPLUME. The witness says that although this programme tends to be a "*worst case scenario*" the standards set in the discharge permit proposed by the Regional Council and achieved by the factory are significantly below those disclosed by the modelling programme. The witness concludes:

"...the discharge of contaminants from the plant is tightly controlled at levels significantly less than those currently permitted. Current emission levels result in predicted ground level concentrations well within the ambient air quality guideline. The guidelines have been established at levels designed to prevent adverse effects to human health or sensitive vegetation or to prevent nuisance to affected communities."

Fluoride

This affects only the health of plant life, at least at anything like the levels which exist in this case. The evidence of Dr Daly establishes beyond any doubt that:

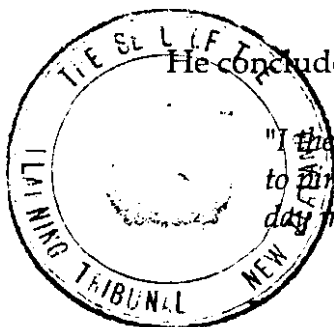
"The ambient fluoride levels for both short and long term exposures were clearly lower than those which would cause damage to such plants ..."

Dr Daly concluded that to the extent there are complaints from local residents which attribute various ailments to exposure to fluoride:

"Environmental explanations for such complaints should be sought in terms of moisture stress, pesticide spray injury or the leaf pathogens themselves."

He concluded:

"I therefore concluded that no evidence of fluoride damage to ornamental shrubs or to pine trees was detected, except on the Works site. The predicted and actual 90 day maximum ambient fluoride levels for Ravensdown Hornby were below plant



injury levels as were maximum 12 hour levels at discharge rates from the den scrubber during the year's operation."

The measurement of air pollution

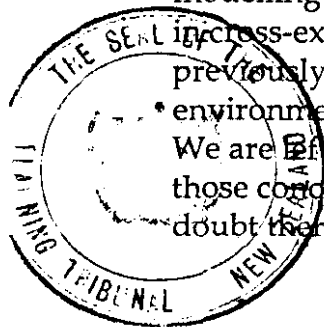
We then heard detailed evidence from Dr T J Brady who is a suitably qualified air pollution consultant, about the appropriate ways of measuring air pollution in circumstances relevant to this appeal. In essence the debate covered in Dr Brady's evidence is as to whether or not it is scientifically acceptable to conduct this type of analysis by use of computer modelling programmes or whether it is necessary to carry out actual monitoring of pollution discharges. This question is central to the difference in the view taken by the Medical Officer of Health compared with the relevant experts called by the applicant. Dr Brady quotes the following passage from the United States Environmental Protection Agency (USEPA) as follows:

"Due to the limitations in the spatial and temporal coverage of air quality measurements monitoring data are not sufficient as the sole basis for demonstrating the adequacy of emission limits for existing sources. Also the impact of new sources that do not yet exist can only be determined through modelling. Thus models while uniquely filling one program need have become the primary analytical tool in most air quality assessments."

In Dr Brady's view air quality models have been applied with the most accuracy in situations where the topography is relatively simple or flat. Hornby is such an ideal situation in Dr Brady's opinion. The purpose of the modelling is to simulate the impact of pollution at a given location. It depends upon the availability of local meteorological data. The only data which can be relied upon relevant to the applicant's Hornby site is that collected at a station in the St Albans area of Christchurch. Dr Brady considered that suitably "screened" this data can be relied upon as an accurate basis for the modelling programme. As to the use of such a method of determining air pollution in New Zealand the witness goes on to say AUSPLUME, which is the model chosen in this case, is used almost exclusively in permit applications in New Zealand and is the preferred model used by air pollution consultants in New Zealand including the Institute of Environmental Science and Research. It is also the preferred model for the Environmental Protection Agency of the State of Victoria in Australia as well as New South Wales and other states. Dr Brady is satisfied that the use of such models has:

"... undergone many validation tests to ensure that they provide realistic predictions of what happens in reality."

Although Dr Brieseman the Medical Officer of Health took issue with the use of modelling programmes compared with actual monitoring it must be recorded that in cross-examination he agreed with the passages from Dr Brady's evidence previously referred to. Similar concessions were made by Mr Pullen the environmental consultant called to give evidence on behalf of the appellant. We are in no doubt that modelling is a valuable tool widely relied upon by those concerned with the detection, control and mitigation of air pollution. No doubt there remains a need for physical monitoring of air pollution but regard



must be had to the inherent shortcomings in any monitoring process. These are dealt with in detail in Dr Brady's evidence and we do not propose to rehearse them. Suffice to say we are persuaded that monitoring on its own does not provide sufficient, reliable data upon which important decisions must be made relating to the cost and nature of pollution control standards which are necessary in the public interest. We are satisfied on the evidence before us that it is only by a combination of monitoring and modelling, that there can be any prospect of striking an even balance between the public interest on the one hand and the right of the industrial user to pursue its activities on the other.

Medical Evidence

The applicant called the evidence of Dr F Jenner. She is a highly qualified consultant in public health medicine. That is, the branch of medicine which involves the diagnosis and management of health problems as they affect groups of people in the community rather than individual patients. Dr Jenner has been involved in a significant number of studies of potentially polluting industries similar to the matters in issue in this case. She deals first with the World Health Organisation guidelines which in turn have been translated into the Ministry for the Environment ambient air quality guidelines previously referred to. These she describes as:

"... intended to provide background information and guidance to governments in making decisions to set standards for air quality control."

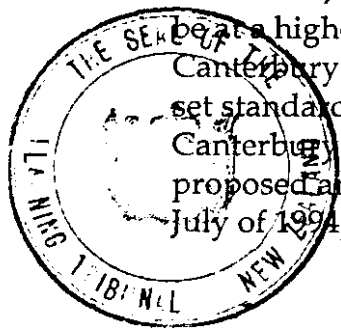
But cautions that before the standards are adopted:

"The guide-line values must be considered in the context of prevailing exposure levels and environmental, social, economic and cultural conditions."

In Dr Jenner's view the guidelines for Europe represent the best recent endeavours to bring together scientific judgement in relation to air pollutants and are quite properly relied upon in her view by the Minister for the Environment in New Zealand. In particular she considers comparison with Europe is valid because there is:

"... the similarity of overall temperate climates. The temperature inversion that arises in Christchurch during the winter is similar to situations that arise in some of the cities of Europe."

The guidelines have been drawn so as to take account of those groups in the community with special medical needs such as those with respiratory or heart conditions, the very young, the elderly and those generally who are considered to be at a higher risk from exposure to air pollutants. Dr Jenner notes that the Canterbury Regional Council in its draft regional policy statement has decided to set standards to maintain minimum ambient air quality in urban areas of Canterbury which are based upon the Ministry for the Environment's 1992 proposed ambient air quality guidelines (now actual guidelines and published in July of 1994). She notes that the guideline recommendations for sulphur dioxide,



hydrogen sulphide and particulate matter (dust) are all consistent with those established for Europe by the World Health Organisation. Indeed the Ministry for the Environment has tightened proposed standards in relation to dust emissions in the final document compared with what was proposed in the discussion paper. Dr Jenner then deals with each of the discharges relevant to this case as follows:

Fluoride

As we have noted the levels set in the guideline are set to prevent adverse effects to sensitive vegetation. They are not related to levels for human health effects because humans are in the doctor's view far less sensitive to fluorides than are plants. She notes that in keeping with the relative lack of importance of ambient fluoride to human health, the World Health Organisation European guideline document does not include a chapter for this element.

We think it is appropriate if we conclude at this point in relation to fluoride that on the evidence before us, and at the very low levels emanating from the applicant's factory, fluoride emission is not a live issue other than in the context of a suitably worded condition to ensure that in the future the existing low levels continue to be met.

Sulphur Dioxide

This can and does constitute a significant health hazard because of its combined adverse effects on the human respiratory system in particular for those people who suffer from asthma and related diseases. The witness deposes that in the World Health Organisation review it was concluded that the minimum level of exposure to sulphur dioxide to produce adverse health effects was a 24 hour mean (average) exposure of 250 micrograms per cubic metre. It thus sets its recommended air quality guideline at 125 micrograms per cubic metre. This level expressed over the various relevant periods has been adopted by the Minister for the Environment in New Zealand as follows:

Short term effects:

- 500 micrograms per cubic metre - ten minute average not to be exceeded
- 350 micrograms per cubic metre - hourly average of ten minute means
- 125 micrograms per cubic metre - 24 hour average

Long term effects:

- 50 micrograms per cubic metre - annual average, taking into account combined exposure to sulphur dioxide and particulate matter

Clearly on the evidence the applicant meets the WHO guidelines.



Sulphur Trioxide

The applicant's factory emits sulphur trioxide and acid aerosols in addition to sulphur dioxide. All three substances may give rise to irritant effects on the lungs similar to those caused by sulphur dioxide in isolation. This association between oxides of sulphur and acid particles has been recognised in setting the guidelines for SO₂ because these substances usually arise together in a moist atmosphere whenever coal/oil burning takes place. Added to this is the fact that the recommended guideline for sulphur dioxide applies to and is ordinarily sufficient for those situations where there is a combination of exposure to sulphur dioxide, sulphur trioxide and acid aerosols.

It is clear from the evidence as set out above that the discharges of sulphur dioxide and sulphur trioxide and acid aerosols from the Ravensdown plant are well below amounts associated with health effects as outlined above. Dr Jenner says:

"I have examined the estimated geographical patterns of frequency of occurrence of maximum sulphur dioxide levels prepared by Mr Clark and these do not include any areas where peaks of exposure will be expected to reach exposures associated with adverse effects on respiratory health. Likewise for chronic effects from likely annual exposures."

The doctor puts into context what on the face of it appears to be the very substantial emissions of sulphur dioxide produced by this factory (250 tonnes per day). She says:

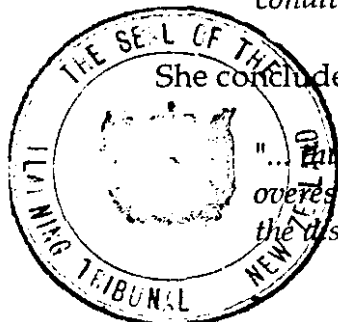
"... 250 tonnes per day acid production and 102 kilograms per hour - 2448 kilograms per day sulphur dioxide emissions showed no exceedances of the one hour guideline of 350 micrograms per cubic metre proposed by the Ministry for the Environment. Further, predicted concentrations - in such a situation of maximal production - were mostly well below this guideline. Only five geographical positions showed a 99.9 percentile one hour ground level concentration above 175 micrograms per cubic metre, this being half the recommended guideline concentration. For the predictions of ten minute concentrations for which the relevant guideline is 500 micrograms per cubic metre there were likewise no exceedances and only four locations predicted to have a 99.9 percentile ground level concentration of 251 - 271 micrograms per cubic metre as a maximal scenario from the Ravensdown emissions."

The doctor then goes on to make the point that these predictions have used:

"worst case' dispersive conditions rather than average or usually expected conditions"

She concludes in relation to these substances that:

"... This conservative modelling approach is that the predicted exposures overestimate actual average exposures, since not every day will be unfavourable to the dispersal of atmospheric pollution."



Therefore use of the ambient air quality guideline standards for protection against short term respiratory effects (Eg asthma), namely 350 micrograms per cubic metre per hour, together with use of the guideline standards for protection against long term respiratory effects (Eg chronic bronchitis), namely 50 micrograms per cubic metre as a maximum annual average, are recommended as appropriate to the discharges of sulphur dioxide."

In response to a question from the Tribunal the doctor confirmed that she recommended these levels in combination of all three of the types of sulphur based emission and confirmed that in her view the annual maximum figure required by the Canterbury Regional Council of 50 micrograms per cubic metre is "very restrictive".

Dr Jenner then deals with hydrogen sulphide.

Hydrogen Sulphide

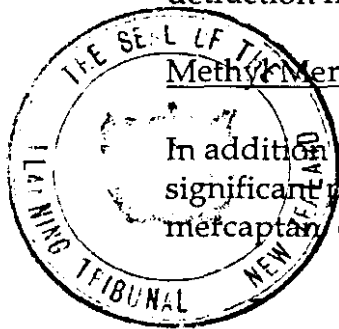
It is important to remember in the context of hydrogen sulphide that of itself at the sort of levels produced from this factory it has no adverse effect on health at all. That is because it does not involve the entry of chemicals into the body. The point about hydrogen sulphide is that it gives off a very disagreeable rotten egg-type smell which does have physical effects on some people including reactions such as nausea, retching and sweating. The doctor considers that this is likely because of stimulation of the nervous system and arises as a natural protective mechanism in nature against the eating of rotten foods. Nevertheless a persistent widespread bad smell in any community must be something with which the Regional Council and this Tribunal is concerned. Recognising that concern the Council proposed odour mitigation guidelines similar to those adopted by the World Health Organisation and the Ministry for the Environment. It proposes seven micrograms per cubic metre as an hourly average recognising that hydrogen sulphide smell can be detected at a threshold as low as 0.2 to 2.0 micrograms per cubic metre. At seven micrograms per cubic metre half hour averages there is likely to be substantial complaints of bad odour. However Dr Jenner notes that:

"These guidelines are set far below concentrations that can cause injury to humans."

And notes that before injury or irritation can occur, for example to eyes, the concentration needs to be as high as 15 milligrams per cubic metre (or 15,000 micrograms per cubic metre) compared with the seven micrograms fixed by the WHO guidelines. We conclude from this that there will be some smell, but that it is not in any way a danger to health, and is not such as to comprise a significant detraction from the amenities.

Methyl Mercaptan, Dimethyl Sulphide and Dimethyl Disulphide

In addition to those pollutants the doctor also notes that there are three other significant polluting elements produced by the applicant factory. They are methyl mercaptan, dimethyl sulphide and dimethyl disulphide.



These are all reduced sulphur compounds each of which is odorous at low levels of exposure. They are similar to hydrogen sulphide in that none of these chemicals produce adverse health effects in humans at anything like the low levels emitted by this factory. It is only at levels of hundreds of thousands of micrograms (for example of methyl mercaptan) that there are signs of damage to the respiratory system. Methyl mercaptan is a normal product of mammalian metabolism arising when sulphur containing proteins are degraded.

In the doctor's view based upon research at other similar factories the concentrations of hydrogen sulphide under 100 micrograms per cubic metre, in combination with exposure to similar levels of the other reduced sulphur compounds referred to above are a problem only because of their odour effects and not because of any adverse health effects.

Dr Jenner then comments upon the concerns raised by submitters to the Regional Council hearing as follows.

Odours

In her view the unpleasant smells noted by people resident in the neighbourhood are likely to arise from reduced sulphur compounds from the plant. These smells are definitely not due to sulphur dioxide at the levels discharged and they do not arise from substances that could cause irritation of the throat and eyes unless there are contaminants in the air from another source.

Dust

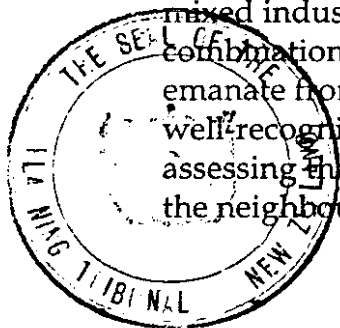
The doctor concludes that the rock phosphate dust from Ravensdown will not be toxic to people who live nearby and will not be expected to give rise to chemical irritant effects.

Asthma

In the doctor's view the Ravensdown Fertiliser Works will operate in such a manner that discharges will lead to ambient concentrations at all times lower than the guidelines. Taking into account other likely sources described in Dr Brady's evidence adverse effects on human health will be avoided.

Local Susceptibility

Generally as to local susceptibility the doctor notes that difficulties can arise in mixed industrial neighbourhoods where people are exposed to chemicals in combination, for example, formaldehyde and isocyanates which reportedly emanate from other factories in the Hornby area. Both of these substances are well-recognised causes of occupational asthma and that must be borne in mind in assessing the impact of the applicant's factory upon the health and convenience of the neighbours.



Various submitters described a variety of symptoms such as smarting eyes, sinusitis, migraines, skin rashes and upset stomachs. In the doctor's view none of the discharges from Ravensdown would account for these particular health experiences.

On the utility of health surveys such as that proposed by the Medical Officer of Health the doctor notes that:

"Any surveys of the people resident in the neighbourhood will only be useful if there is also documentation of their degree of exposure to substances in the ambient atmosphere. Otherwise reported symptoms will not be interpretable even with comparison groups who live elsewhere. It is especially difficult to seek patterns associated with industrial exposure for symptoms that commonly occur anyway Eg sinusitis, itchy eyes, asthma."

Against that background the doctor makes the following recommendations:

1. That it is the discharge of sulphur oxides and related acids that are of concern to human health in this area. The reduced sulphur compounds also give rise to a social problem by virtue of the unpleasant odour but this is not of medical significance.
2. The World Health Organisation and Ministry for the Environment guidelines:

"... are recommended as the basis for the setting of guide-line standards to protect the health of the people in the Christchurch urban area".

The doctor emphasises the fact that these guidelines already incorporate:

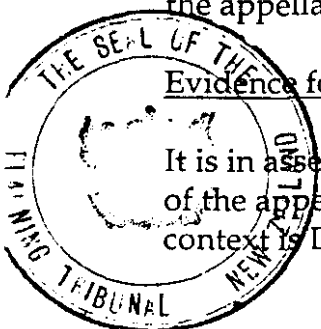
"... a protective factor sufficient to protect vulnerable members of the community, for example those with asthma and other respiratory diseases. In other words they take account of the likely sensitivity of the receiving environment".

That is the evidence in support of the application.

Mr Venning for the respondent did have available a witness, Mr Millichamp who was ready to give evidence in support of the stance taken by the Regional Council in its decision and the conditions it imposed. Having considered the matter we directed that Mr Woodward open his case and call his evidence and having heard that we would then consider further whether it was necessary to hear from Mr Millichamp. In the result it was not. We therefore turned to the evidence for the appellant.

Evidence for the appellant

It is in assessing the weight to be given to this evidence that the confused history of the appellant's stance becomes of importance. The principal witness in this context is Dr M A Brieseman. In the course of his evidence Dr Brieseman was

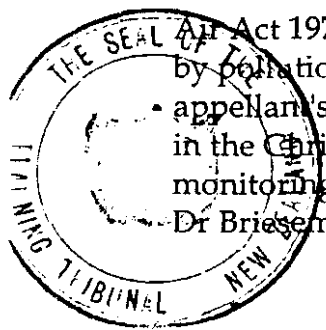


asked by the Tribunal and by counsel whether or not it was ever his intention to suggest that this factory should be closed pending the commissioning of studies recommended by him. The doctor denied that was ever his intention in bringing this appeal. He says that his concerns relate solely to the question of the imposition of suitable conditions including the commissioning of health studies and the monitoring of the ambient air quality. We simply do not know what to make of this sharp division of opinion between what is contained in the papers filed on the appellant's behalf and what he now says is and was his stance throughout. Suffice to say it reinforces the impression that we have gained that there can be no question of denying this applicant the resource consent which it seeks. The only residual question which can arise on the evidence, as distinct from the papers is whether or not the conditions fixed by the Regional Council and as amended by agreement between the Regional Council and Mr Marquet for the applicant in the course of Mr Venning's closing submissions are appropriate and exhaustive. Given that conclusion much of what Dr Brieseman had to say ceases to have any great relevance in deciding that simple issue. Nevertheless in deference to the carefully prepared statement of evidence we think we should at least traverse it in order to make it clear that we have taken its contents into account.

The nub of Dr Brieseman's complaints are:

1. That the WHO and Ministry for the Environment's guidelines must not be taken as a maximum up to which industries such as the applicant are entitled to pollute. In particular he makes the valid point that it would be wrong to allow this applicant to, as it were use up all of the permitted level of pollution in any particular district. We agree with that proposition but there is no evidence before us that such is the case.
2. The doctor considers there is an urgent need for monitoring of the ambient atmospheric pollution levels in this district and that until the result of such a survey is available the sensible and prudent course is to restrict the grant of the resource consent in this case to a maximum of five years.

We have already dealt at some length with the difficulties of making decisions such as this based on the results of physical monitoring and have made our findings in respect of the more appropriate use of computer modelling for this purpose. As we understand it Dr Brieseman agrees with this conclusion. But in addition to those findings we find it surprising that the appellant should be placing such emphasis on this particular requirement as a means of persuading us that the grant of the consent should be restricted to a period of five years (described by Mr Marquet with some force as derisory). Medical Officers of Health have for many years, and certainly since the Health Act 1952 and the Clean Air Act 1972 had wide powers of intervening to protect public health threatened by pollution from industrial activities. On no occasion known to any of the appellant's witnesses has the Minister of Health or any Medical Officer of Health in the Christchurch area ever thought it necessary to carry out the sort of monitoring and population health surveys in this district now recommended by Dr Brieseman, presumably at the cost of the applicant. One can only speculate



about why that was never done. Certainly it is no speculation to conclude that if any responsible Medical Officer of Health had received complaints which disclosed any serious health problems which might be attributed to the activities of the applicant, they would have been investigated as they arose.

It is also significant in this context that although the Clean Air Act continues to have some transitional significance, the powers formerly vested in the Medical Officer of Health to investigate and intervene in these matters have been taken away and given to bodies such as the Canterbury Regional Council. It now has responsibility to carry out the sort of public health enquiries regarded as of such importance by Dr Brieseman.

Finally it should be noted that the Resource Management Act confers upon the Canterbury Regional Council powers to review consents such as are sought in this case, and conditions attached to them. It seems that Dr Brieseman has no faith that the Regional Council will discharge those statutory obligations. That is an inevitable conclusion from his complaint that both the statutory powers of intervention by way of review and the review condition included in the resource consent granted to the applicant by the Regional Council are permissive only. It appears that the doctor would be content if we were to impose a condition that the Regional Council must review the conditions of this resource consent at some preordained regular interval. For reasons which will appear later when we come to analyse the review provisions of the legislation we do not consider that is an option open to the Tribunal and if it were it is certainly not one which we would choose to exercise in this case. What Dr Brieseman appears to have overlooked is that in imposing a condition which allows for annual reviews by the Council (as it has) that is a very much tighter supervision of the operation by the applicant of the resource consent than the proposal made by him that the term of the grant be for only five years.

We must view with some scepticism this request by the appellant involving, as it does, a further opportunity for the appellant to interfere directly in this matter after the expiration of five years, something Parliament expressly legislated against by vesting those powers in the Regional Council.

We now deal with the evidence of Mr D R Pullen. He is the officer who granted the extant Clean Air Act licence. He is therefore directly responsible for setting the levels for emission standards contained in that document and which, as we have previously demonstrated, will either be met by the Regional Council conditions or bettered. Mr Pullen traverses the history of the establishment of the plant and points out that at the time it was built there were very few houses in the area but that as time has progressed:

"... the area has developed into a major suburb of Christchurch."

We pause to observe that this itself is of some significance. The applicant has been established on this site since 1922. At that time this was a largely rural and heavy industrial area. Successive local authorities have allowed a residential area to develop opposite the applicant's factory and other similar industries in the area.



That fact, coupled with the complete absence of any studies such as those now proposed by the appellant's witnesses, militates against the notion that the applicant is an industrial polluter causing significant health problems to the residents of this area.

Against that background Mr Pullen considers that although since the 1970s no attempts have been made to gather air quality information in the Hornby area the acquisition of this information is now urgently required. Mr Pullen's concern is expressed in this way:

"At the present level of control there will be effects in the adjoining area - I do not think that this is disputed by any of the parties present. The question to be addressed at present relates to the acceptability of these effects, not all of which may at present be fully documented, or the need to impose more stringent controls on the fertiliser works and other industrial emissions in the area."

Mr Pullen acknowledges that the conditions imposed by the Canterbury Regional Council appear to relate to the "best practicable option" which he agrees is something contemplated by s.108 of the Resource Management Act 1991. He says that while these conditions have reference to the nature of the discharge they do not in his view appear to have considered matters relating to the receiving environment. His concern therefore is similar to that of Dr Brieseman. Put simply he contends that there is not enough known about the state of the receiving environment in order to sensibly fix maximum emission standards. He regards this work as imperative and says:

"The collection of this information and the measurement activity is a very large and expensive task which clearly forms part of the 'Air quality management plan' for the Hornby area and greater Christchurch."

Although that may be a laudable aim it does not with respect assist us in deciding whether or not this application meets the relevant statutory criteria imposed by the Resource Management Act. These are counsels of perfection. We are required to deal with circumstances as they are - the evidence with which we are presented - measured against the relevant statutory criteria.

The other witness for the appellant was Mr Bruce Taylor. He gave evidence about what he understands to be the purpose of the Ministry for the Environment's ambient air quality guidelines. He says that:

"The main purpose of the draft guidelines was to meet a demand for guidance on air quality and the control of adverse effects from air discharges. The guidelines were to address the new 'control of effects' approach of the Resource Management Act, as distinct from 'minimising emissions using the best practical means' approach of the Clean Air Act. They were intended to assist regional councils in their new air quality management functions under the Resource Management Act."



Mr Taylor continues that the guidelines were:

"... intended to be a set of baseline values which represent a minimum level of air quality required for the protection of health and the environment in any location."

He acknowledges that Regional Councils may incorporate more stringent values in their regional plans. The thrust of Mr Taylor's evidence is:

"... it is not appropriate to use the guidelines as a set of maximum permissible concentrations of pollutants in air for individual sources"

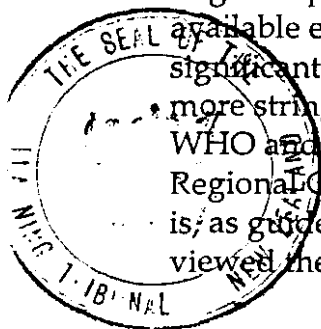
and he gives five reasons for that. To do so he says would be:

"... contrary to the purpose and principles of the Resource Management Act and to the duties in that Act to avoid, remedy or mitigate adverse effects."

As a general observation there is no doubt some force in that opinion. However in our view it overlooks the practical problem which faces bodies such as Regional Councils and this Tribunal in deciding where to strike the balance between the requirements of public health and the need to allow legitimate industrial concerns to continue in business given that it is now finally clear that the appellant does not wish to close down the applicant. It would be cynical and probably unlawful to achieve that object by the imposition of conditions which the applicant simply cannot meet in any practical way. Judge Skelton was alive to this concern in drawing the possibility to Mr Woodward's attention at the first pre-trial conference resulting as it did in the plain assertion by the appellant that it did in fact wish to persuade the Tribunal that no resource consent relating to the noxious emissions should be granted.

The view also overlooks the plain fact that the WHO and Ministry for the Environment guidelines have built into them a recognition of the needs of special interest groups and in addition provide for a safety factor by reducing the permitted minimum levels to one-half of the level at which there is no known adverse health effects. In discharging difficult tasks such as this Regional Councils must of course act responsibly. In doing that they are in our view entitled to have close regard to such guidelines while of course recognising that the particular circumstances of any case might suggest that the guidelines could be reduced or possibly exceeded.

Thus for example were this factory to be established in an area in which meteorological evidence has shown a very high and prompt dispersion rate it might be possible for the guidelines to be exceeded. On the other hand, if the available evidence shows that the dispersion rate is for climatic reasons significantly worse than in other areas, then it might be necessary to impose even more stringent controls. But at the end of the day if these emanations from the WHO and the Ministry for the Environment are to be of any practical utility to Regional Councils they must serve the purpose by which they are described, that is, as guidelines for the making of decisions. That is how the Regional Council viewed them in this case and we think it was right to do so. We adopt a similar



approach and we do not share the concerns expressed by Mr Taylor, Mr Pullen and Dr Brieseman in this matter.

That then is the evidence for the applicant and the appellant. It is now necessary for us to consider the relevant statutory criteria. We begin by dealing with some preliminary matters.

1. **Planning Instruments**

(a) Christchurch City Council (Paparua County) Transitional District Plan

The land in question is zoned in the above plan as Industrial 3 except for a 30 metre strip fronting the roadway which is zoned Industrial 1. The applicant's use is discretionary under that plan. Reference is made to page 145 section 5(3)1. Fertiliser and manure manufacture is included in Appendix A, that is, Industrial Processes Requiring Segregation Because of Noxious or Dangerous Elements. The plant also has existing use rights by virtue of its historic occupation of the site.

(b) The regional policy statements

There is no operative regional policy statement. The Canterbury Regional Council has notified its regional policy statement on 1 October 1993 and cross-submissions were called for by public notice on Saturday 30 July 1994. Section 13 of the statement is devoted to air. In paragraph 13.1 the following appears:

"Winter air quality in all urban areas of the region is affected to varying degrees by smoke from domestic fires and motor vehicle emissions. Industrial emissions are not a major source of ambient quality problems in Canterbury ...

Discharges from industrial or trade premises are not allowed unless permitted by a rule in a plan or by a discharge permit."

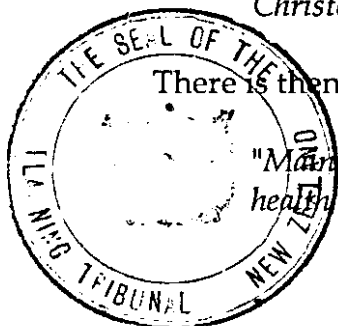
Under the heading "Issue Resolution" at paragraph 13.2 there is stated the following:

"Issue 1

Existing and potential health and nuisance effects of low ambient air quality in the urban and settled areas of Canterbury particularly in and around Timaru and Christchurch."

There is then objective 1 and a number of policies. The objective is to:

"Maintain or improve ambient air quality so that it is not a danger to people's health and safety, and reduce the nuisance effects of low ambient air quality."



There are then three policies, an explanation and reason which concludes by noting:

"The Ministry for the Environment's 1992 proposed ambient air quality guidelines are based primarily on requirements for human health protection. By adopting these as a base level the Council is safeguarding the life supporting capacity of air and avoiding some of the worse effects of air pollution consistent with the purpose of the Act."

Policy 6 is relevant. It provides as follows:

"Applicants for consents to discharge contaminants into air should demonstrate that the proposed discharge will use or incorporate the best practicable option having regard to alternative disposal methods, the nature of the discharge and the existing ambient air quality."

Mr Marquet submits that having regard to the status of this document and its passage through the planning process it is not to be accorded any great legislative effect for the purposes of this application. We respectfully disagree. Although the Council is yet to consider the cross-submissions and make decisions upon them, and of course there is the possibility of appeals to this Tribunal, we make the general observation that in the matter of something as fundamental as air quality in the region, some provision will need to be made in the plan to deal with the problem of air pollution.

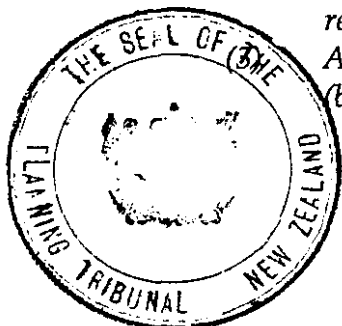
Indeed it is plain to us from the applicant's evidence that it has in fact to date used its best endeavours to meet the "best practicable option test" in that it has on a number of occasions installed, upgraded and changed its anti-pollution techniques in the light of advances in scientific knowledge and technical expertise. We therefore do have regard to the provisions of the regional policy statement concerning air pollution.

The Resource Management Act

As we have already noted this appeal must be dealt with in terms of the legislation as it stood before the 1993 amendment (see s.230(5) of the 1993 amending Act).

Mr Marquet submits and we agree that this application is to be dealt with in accordance with s.88(3)(b) of the Act. It provides that:

- "(1) Any person may in the manner set out in subsection (4), apply to the relevant local authority for a resource consent.
 An application may be made for a resource consent -
 (b) where there is no plan or proposed plan, for an activity for which consent is required under Part III."



This is such an application by virtue of the provisions of s.15. It provides:

- "(1) No person may discharge any -
 - (c) Contaminant from any industrial or trade premises into air unless the discharge is expressly allowed by a rule in a regional plan and in any relevant proposed regional plan, a resource consent or regulations."

It is common ground that the chemicals which the applicant discharges into the atmosphere in the vicinity of its factory are contaminants within the meaning of that term as defined in s.2 of the Act, that is:

- "Substance (including gases, liquids, solids and micro-organisms) or energy (excluding noise) or heat, that either by itself or in combination with the same, similar, or other substances, energy, or heat -
 - "(b) When discharged onto or into land or into air, changes or is likely to change the physical, chemical, or biological condition of the land or air onto or into which it is discharged."

Section 104 specifies the matters which we are required to take into account in considering an application for a resource consent as that term is defined in s.87. Relevant to the facts of this case s.104 provides that:

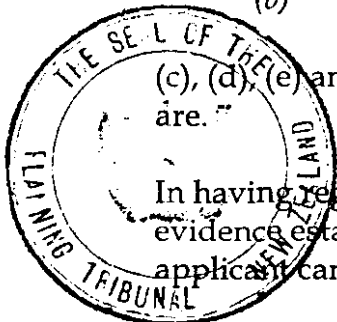
- "(1) Subject to subs.(2) when considering an application for a resource consent the consent authority shall have regard to any actual and potential effects of allowing the activity."

Subsection (3) provides:

- "3. Where an application is for a discharge permit ... to do something that would otherwise contravene section 15 (relating to discharge of contaminants) the consent authority shall, in having regard to the actual and potential effects of allowing the activity have regard to -
 - (a) the nature of the discharge and the sensitivity of the proposed receiving environment to adverse effects and the applicant's reasons for making the proposed choice; and
 - (b) Any possible alternative method of discharge including discharge into any other receiving environment."
- "4. Without limiting subsection (1), when considering an application for a resource consent, the consent authority shall have regard to -
 - (a) Any relevant rules of a plan or proposed plan; and
 - (b) Any relevant policies of objectives of a plan or proposed plan..."

(c), (d), (e) and (f) are not relevant, but (g) Part II; and (h) "Any relevant regulations" are."

In having regard to the combined effects of those sections we find that the evidence establishes that at certain levels the contaminants discharged by the applicant can constitute a danger to the health of the inhabitants of the area in the



vicinity of the applicant's factory (we can put it no more accurately than that on the evidence.) There is no evidence of any particular sensitivity of the proposed receiving environment to the discharges proposed by the applicant and at the levels at which they are proposed.

The applicant's reasons for discharging the contaminants by way of chimneys into the atmosphere are that there is simply no other practicable or known technological way of dealing with the residual contaminants that arise from the applicant's manufacturing processes which in turn means that there are no other possible alternative methods which are open to consideration by us.

Logically we now turn to s.105. Mr Marquet draws attention to the fact that the Tribunal has power pursuant to s.105(1)(b), in granting an application such as this, to:

"... include any conditions in the consent".

Section 108(i)(e) is relevant insofar as it provides that:

- "(1) A resource consent may include any one or more of the following conditions:
- (e) ... requiring the holder [of any discharge permit] to adopt the best practicable option to prevent or minimise any actual or likely adverse effect on the environment of the discharge and other discharges (if any) made by the person from the same site or source:"

Subsection 2 makes it clear that the imposition of a condition such as referred to in s.108(1)(e) does not limit the conditions upon which the resource consent may be granted. Subsection (8) provides:

"Before deciding to grant a discharge permit ... to do something that would otherwise contravene section 15 (relating to the discharge of contaminants) subject to a condition described in subsection (1)(e), the consent authority shall be satisfied that, in the particular circumstances and having regard to

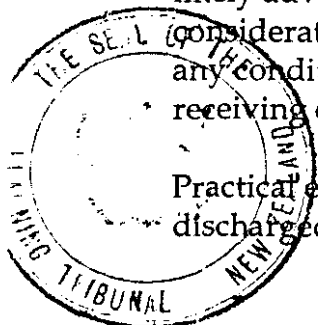
(a) *The nature of the discharge and the receiving environment; and*

(b) *Other alternatives, including any condition requiring the observance of minimum standards of quality of the receiving environment*

The inclusion of that condition is the most efficient and effective means of preventing or minimising any actual or likely adverse effect on the environment."

Those provisions of s.108 are in our view significant in that the legislature clearly contemplates that it is the best practicable option to prevent or minimise actual or likely adverse effects on the environment which is the relevant test, coupled with a consideration of the nature of the discharge and the receiving environment and any conditions requiring the observance of minimum standards of quality of the receiving environment.

Practical effect is given to those requirements by ensuring that the contaminants discharged by the applicant are at a level which on the best scientific and technical



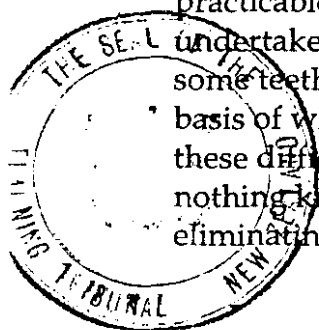
information available constitute the best practicable option of minimising adverse effects on the environment. The key word in our view is "*practicable*". As we have said it would be wrong to grant a discharge permit on conditions which afford the holder no practical means of compliance.

We are satisfied on the evidence for the applicant that the measures which it has taken enable it to meet air quality standards which are well within the guidelines proposed by WHO and the Ministry for the Environment. Those standards accord with or are better than those previously required by the regional air pollution control officer for the purposes of the Clean Air Act 1972. There is no evidence that at those levels the discharges will cause any known health problems to inhabitants of the area and therefore it can properly be said that if such standards are imposed by way of conditions as contemplated by the Regional Council they would have the effect of being the best practicable option of either preventing or at worst minimising the actual or likely adverse effects of the discharge of the contaminants on the receiving environment.

In coming to this view we do not overlook the fact that the term environment is widely defined in s.2 of the Act to include:

- "(a) *Ecosystems and their constituent parts, including people and communities; and*
- (b) *All natural and physical resources; and*
- (c) *Amenity values; and*
- (d) *The social, economic, aesthetic and cultural conditions which affect the matters stated in paragraphs (a) to (c) of this definition or which are affected by those matters:"*

Given that extended definition it is clearly more than just the receiving air which must be considered in the context of s.108. It is also relevant to the facts of this case that it is amenity values and the social, economic, aesthetic and cultural conditions of the people of the surrounding area which must be borne in mind. That is particularly relevant in the case of odour from the factory although it is not a danger to health in any way. Clearly it is capable of adversely affecting the amenity values of the district and the social, economic, aesthetic and cultural activities which take place there. Our duty is to ensure that suitable conditions are imposed which require the applicant to adopt the best practicable option for preventing or minimising the dissemination of that odour into the surrounding community. We are satisfied on the evidence that it has done so, adopting the best practicable option by the installation of a soil filter, something voluntarily undertaken since the Regional Council hearing, while noting that there have been some teething troubles with its implementation, the evidence satisfies us, on the basis of what has taken place at the applicant's Ravensdown plant in Dunedin that these difficulties can be and will be overcome at its Hornby plant. Although nothing known to science and technology at present is capable of completely eliminating the odours from this factory we are satisfied that the applicant has



done all that is practicable at the present time to minimise the adverse effects on the environment of the odour discharge.

Insofar as adverse health effects are concerned we have dealt with these at length earlier. We simply reiterate in the context of considering the provisions of s.108 and the appropriate conditions which must be attached to the grant of this resource consent that we can find no evidence that discharges at the level which will be permitted will result in any adverse effects to the health of the inhabitants of the district. Neither do we have any evidence upon which we could find that the discharges of hydrogen sulphide, acid mist and sulphur dioxide at the levels which will be permitted will adversely effect the amenity value of the inhabitants or their social, economic, aesthetic and cultural conditions.

Mr Woodward draws our attention to s.5 of the Act and in particular s.5(1) recording that:

"The purpose of this Act is to promote the sustainable management of natural and physical resources."

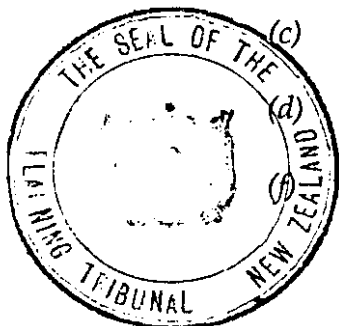
Sustainable management means:

- "(2) ... managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people in communities to provide for their social, economic, and cultural well-being and for their health and safety while
 - (b) Safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
 - (c) Avoiding, remedying or mitigating any adverse effects of activities on the environment."

For all the reasons we have given earlier we are satisfied that with suitable conditions the grant of this discharge permit will not be contrary to any of those purposes of the Act and indeed in terms of the economic well-being of the Hornby community in particular and the wider farming community in general we must have regard to the fact that this applicant is a substantial contributor to the well-being of those communities. That is a matter to which regard must be had in giving effect to the purpose of the Act as prescribed in s.5.

While dealing with Part II of the Act we also notice that s.7 requires that we have particular regard to:

- "(b) The efficient use and development of natural and physical resources:
- (c) The maintenance and enhancement of amenity values:
- (d) Intrinsic values of ecosystems: —
- (e) Maintenance and enhancement of the quality of the environment:"

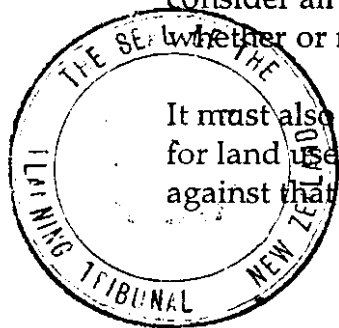


Although none of those are expressed to be matters of national importance, they are clearly matters to which we must have regard and as will be clear from the foregoing we do so.

Mr Woodward places some emphasis on the case of Te Aroha Air Quality Protection Appeal Group v Waikato Regional Council (No. 2) (2 NZRMA, 575). That was a case in which the applicants sought to establish a beef by-products rendering plant near to an existing export beef plant in Te Aroha. The plant was situated in a Rural A1 zone and was a non-complying activity. The neighbourhood of the site was relatively closely occupied for a rural area and included a race-course, a motor camp and a cemetery. The plant premises incorporated air control systems to capture emissions of odour and a biological filter to absorb odorous compounds. The application was for a land use consent and permits to discharge contaminants into the air from the bio filter and a boiler flue. The applications were granted by the Waikato Regional Council and the Air Quality Protection Group appealed. The decisive factor in the appeal was the discharge permit allowing for the emission of odours. The appeal was allowed on the basis that odour from the rendering process was offensive and could be nauseating and that occupiers of property and business people in the Rural A1 and Rural B zones neighbouring the site were entitled at all times and without qualification to be free from having to experience that odour. In coming to that view the Tribunal adverted to the provisions of s.3 of the Resource Management Act and in particular an effect which might be of low probability but has a high potential impact. Mr Woodward submits that even in the best designed and best managed plant an accident could occur. The plant could fail through breakdown, human error or an unexpected combination of events and that therefore there could be an event of low probability but high potential impact which "*could rule out the grant of a discharge permit*".

That is with respect too simplistic an approach to a complex problem. It cannot, in our view, be seriously argued that because there is some prospect that inhabitants of the area surrounding the applicant's plant might at some time be subjected to unacceptable levels of odour resulting from some possible breakdown in the plant's control systems then by virtue of that circumstance alone an application such as this for a discharge permit must of necessity be rejected. To approach the matter in that way in our view ignores the provisions of s.108 which expressly enjoins the consent authority to consider conditions which require a holder to adopt the best practicable option to prevent or minimise any actual or likely adverse effects on the environment of the discharge. The legislature clearly contemplates that there must be circumstances where the best practicable option will only minimise the adverse effects on the environment. It will not obviate them entirely. In our view the proper approach is for the consent authority to consider all of the relevant evidence and relevant statutory criteria and to decide whether or not to grant the application.

It must also be recalled that the Te Aroha case was concerned with an application for land use consent to establish a non-complying activity in a Rural zone. It is against that background that the Tribunal expresses the view that it did



concerning the matter of odour emission. At page 582 the Tribunal said:

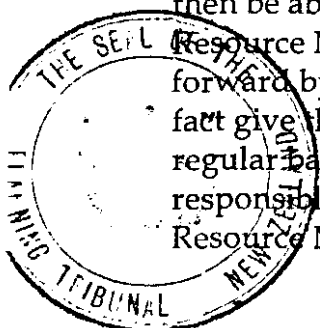
"For both applications the decisive issue is odour emission. The odour from the rendering process is offensive and can be nauseating. Occupiers of properties in the Rural A1 and Rural B zones in the vicinity of the site are entitled to be free from having to experience that odour. Proprietors of businesses on properties in the vicinity of the site are entitled to be able to conduct those businesses without their patrons or customers being deterred by experiencing rendering plant odour.

Occupiers, business people and their patrons should be free of rendering plant odour at all times without condition or qualification. It would not be sufficient for the proprietor of a rendering plant to demonstrate that emission of rendering plant odour which reached adjacent properties was the result of an unforeseen or random accident or malfunction. Defences available under s.342 should not be a sufficient response where a rendering plant has been established out of zone on land where the activity is not a permitted activity."

In this case the applicant has existing use rights and has long been established on land which is suitably zoned subject only to the additional qualifications contained in Schedule A of the transitional district plan. In those circumstances persons living in or coming to the areas adjacent to the industrial zoning cannot expect an environment free from odour from the plant at all times without condition or qualification. To the contrary, in the circumstances which exist in this case the Resource Management Act requires that the consent authority impose such conditions as will result in the most efficient and effective means of preventing or minimising any actual or likely adverse effect on the environment. If, on the known state of science and technology odour cannot be prevented then the consent authority's duty is to minimise it by the imposition of appropriate conditions consonant with the provisions of Part II of the Act and ss.104, 105 and 108. It follows from what we have said that we do not agree with Mr Woodward's submission in the circumstances of this case.

Continuing review of conditions

In the way in which the hearing resolved itself this became the central issue in the mind of the appellant. In essence what Dr Brieseman is concerned about is that although the Resource Management Act allows for a consent authority to impose a condition that the terms of the grant of any resource consent may be reviewed from time to time, he apparently does not have any faith in the integrity of that process. It is for that reason that he has suggested that the term of this resource consent be limited to five years so that the applicant will have to apply afresh after that time and the whole matter can be looked at again, a process in which he will then be able to play a part which is otherwise denied him by the provisions of the Resource Management Act. Dr Brieseman is unimpressed by the argument put forward by the applicant that the conditions attached to the discharge permit in fact give the Regional Council much more effective powers to review on a more regular basis than was his proposed suggestion. As this submission is made by a responsible public officer we must consider it in the light of the provisions of the Resource Management Act.



Beginning at s.128 the Act makes provision for a system of review of previously granted consents. Section 128 describes the circumstances in which a consent can be reviewed. Section 129 sets out the procedure to be followed. Section 130 requires that a review be the subject of a hearing by a hearing committee set up under the nominated sections of the Act. Section 131 deals with matters to be considered in any such review. Section 132 relates to what a consent authority may do in relation to conditions of a resource consent which have been the subject of the review.

It is immediately apparent from that brief summary of the relevant provisions that Parliament recognised that from time to time it will be necessary for a consent authority to revisit a previously granted application and to review any conditions attached to it. Mr Venning in his submissions described this as "*a living process*". We think that to be a very apt description of Parliament's intention in enacting the review provisions.

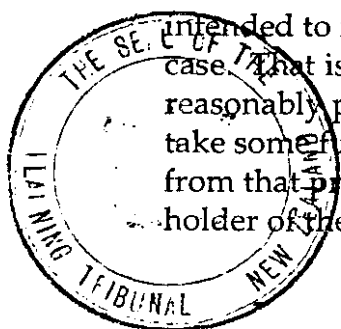
It is important to keep in mind that a review is not an enforcement proceeding. See New Zealand Rail Ltd v Marlborough District Council [1994] NZRMA 70. At p 91 Greig J in agreeing with the views expressed by Judge Skelton said:

"I think care has to be taken to ensure that what is set down by this condition is not just another policing provision to ensure compliance with the conditions and the terms of the consent granted. Its for the purposes of reconsidering the conditions of the consent to deal with matters which arise thereafter in the compliance exercise of the consent activity. It is not, I think, in place of other provisions in the Act for the control and enforcement of the conditions of the consent."

It is in our view a mechanism by which a consent authority can ensure that conditions imposed on a resource consent do not become outdated, irrelevant or inadequate. In exercising that statutory function it is, we think, important to keep in mind that it is not a mechanism by which a resource consent can be impugned. We think it clear that in reviewing the efficacy of any particular conditions, the consent authority is not entitled to amend those conditions or impose new conditions which has the effect of preventing the activity for which the resource consent was granted. Those are matters which the consent authority must take into account in deciding whether or not to grant the consent in the first place.

To allow for such a possibility would introduce an entirely unacceptable degree of uncertainty into the resource management process which cannot have been contemplated by Parliament.

With that important caveat we are satisfied that the review provisions are intended to meet the concerns expressed by the Medical Officer of Health in this case. That is, that if developments in science or technology are such that it is reasonably practicable to require an industry such as the applicant in this case to take some further, other or better means of complying with the resource consent from that previously specified, then it may do so by the review process. The holder of the consent of course, has its full rights of objection and appeal.



It should also be noted that paragraphs (a) and (b) of s.128 appear to us to be designed to achieve quite different ends. Paragraph (a) envisages the case where the consent authority imposes conditions on the grant of a consent to meet the circumstances set out in subparagraphs (i), (ii) and (iii) of that subsection. Subsection (b) we think must be read disjunctively. It relates, among other things, to "*discharge permits*" in the context inter alia of "*air quality*" and allows the Regional Council to form an opinion that "*it is appropriate to review the conditions of the permit in order to enable ... standards set by the rule to be met*".

Clearly subparagraph (b) can only apply where the Regional Council has first brought down a rule governing (relevant to this case) minimum standards of air quality and notwithstanding the imposition of conditions of an earlier grant of resource consent, forms the opinion that those conditions no longer meet the terms of the rule subsequently brought into being.

In those circumstances Mr Venning and Mr Marquet (who adopted Mr Venning's submissions in their entirety) submit, and we agree that it is open to the Regional Council to set in motion the review procedure provided for in ss.129 to 133. Construing the review provisions in this way we are satisfied that they are more than adequate to meet the concerns expressed by the Medical Officer of Health in this appeal. Indeed they provide a more rigorous and effective mechanism for ensuring that the applicant company does not adversely affect the air quality of the area surrounding its factory and provides a more efficacious procedure than the somewhat blunt instrument suggested by the Medical Officer of Health, that the term of this resource consent be limited to five years to enable these matters to be looked at afresh after that time. We can see no grounds for the appellant's pessimism concerning the integrity of this process. We must, and do assume that the Regional Council will do its duty according to law in enforcing and monitoring these discharges.

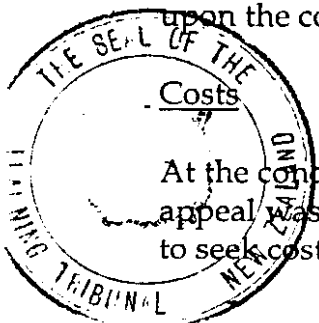
Conclusions

We are therefore satisfied, as we intimated to the parties at the conclusion of the hearing, that the Regional Council was right to grant the resource consent applied for and upon the conditions proposed by it with the amendments set out in counsel's closing submissions, all of which are agreed to by counsel for the applicant and with the exception of the review procedure and the duration of the permit, not criticised by the appellant. Those conditions form an appendix to this decision.

The appeal is therefore dismissed and the resource consent applied for is granted upon the conditions set out in Appendix A.

Costs

At the conclusion of the hearing counsel for the applicants contended that if the appeal was to be dismissed then in all the circumstances the applicant was entitled to seek costs against the appellant. Mr Venning for the Canterbury Regional



Council took instructions on the matter and informed the Tribunal that somewhat unusually his client had directed that he make a similar application. We adjourned the matter for Mr Woodward to take instructions and then heard submissions from counsel.

Mr Marquet submits that costs should be awarded on the conventional basis that they follow the event. In making that submission Mr Marquet is conscious that in resource management applications such as this there is no such general rule particularly where the appellant is a public officer discharging what may properly be described as a duty to protect the public interest.

Notwithstanding that obvious difficulty Mr Marquet submitted that the Medical Officer of Health had from the outset adopted an ambiguous position. We have traversed in some detail the chronology of events concerning that matter and we agree. It is in our view clear beyond any doubt from the text of the minutes recorded by Judge Skelton, and not controverted by any counsel that until Mr Marquet's opening of the applicant's case in this appeal both the applicant and the Canterbury Regional Council were under the impression that they were facing an appeal in which the appellant would seek to persuade the Tribunal that no resource management consent in the form of a discharge permit should be granted to this applicant. That of course is a very serious matter for an industry such as the applicant with an investment of something in excess of \$50m at the Hornby site.

It is also a matter of significant public concern to the Canterbury Regional Council. As we understand it, this is the first of the major discharge to air permit cases to come before it since the passing of the Resource Management Act. It is obviously closely concerned in the outcome and in the Tribunal's view of the proper construction of the relevant statutory provisions. To that end Mr Venning had briefed and had available, detailed evidence to assist the Tribunal.

Against that background both Mr Marquet and Mr Venning submit that it is as a direct consequence of the appellant's ambivalent stance that their respective clients have been put to the expenses detailed in the memoranda filed on behalf of their clients.

Mr. Woodward was given the opportunity of commenting by way of written memorandum on the submissions of counsel, and their memoranda setting out the amount of costs and disbursements incurred. He submits correctly that there is no general practice in this Tribunal of awarding costs to a successful party, against another party and that his client is a public officer carrying out a statutory duty important to the general public interest. It is also true to say, as counsel does that the objection was not made with any ulterior motive or frivolously.



The Tribunal's power to award costs is set out in s.285 of the Act:

"285. Awarding costs-

- (1) *The Planning Tribunal may order any person appearing before it to pay-*
 - (a) *To any other person appearing before it, any costs and expenses (including witness expenses) incurred by that other person:*
 - (b) *To the Crown, the Tribunal's costs and expenses according to the scale - of costs set out in regulations.*
- (2) *If any person fails to proceed with a hearing at the time arranged for it by the Planning Tribunal, or to give adequate notice of abandonment of proceedings, the Planning Tribunal may order the person in default to pay-*
 - (a) *To the Crown; or*
 - (b) *To another party-*
any of the costs and expenses incurred by the Crown or the other party."

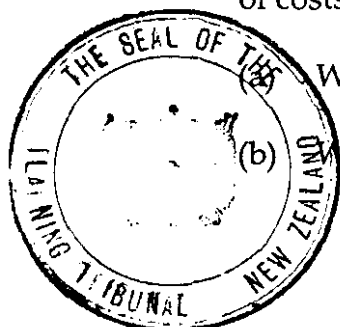
Principles governing the award of costs

Because of the amount of costs involved in this case and the circumstances in which they are claimed, we think it appropriate to summarise the relevant principles by which we propose to be guided. We do so as follows:

1. The practice note of this Tribunal dated 29 July 1992 makes it clear that in the matter of resource consent applications the Tribunal will not normally award costs against a public body who's decision is the subject of an appeal. In this case it is the Director General of Health who appealed from a decision of the Regional Council, but we nevertheless think it appropriate to keep in mind that we are considering an award of costs against a public official carrying out public duties.
2. It has never been the norm in proceedings under either the Town and Country Planning Act or the Resource Management Act for costs to follow the event. Westway Contractors Limited v Christchurch City Council (C 97/93).
3. There are cases in which it is appropriate to award costs against public bodies and guidance as to the circumstances may be had from cases such as Darrick v Northland Regional Council (1993) 2 NZRMA 637 and Taylor v Manukau City Council (C 119/92).
4. Guidance is also to be had from the decision of the High Court in DFC New Zealand Limited v Bielby [1991] 1 NZLR 587, where the Court set out five relevant circumstances to be taken into account in making significant awards of costs. They may be summarised as:

(a) Where arguments are advanced which are without substance.

(b) Where the process of the Court is abused.



- (c) Where the case is poorly pleaded or presented, including conducting a case in such a manner as to unnecessarily lengthen the hearing.
- (d) Where it becomes apparent that a party has failed to explore the possibility of settlement where compromise could have been reasonably expected.
- (e) Where a party takes a technical or unmeritorious point of defence.

See also the decision of Hammond J in Hamilton City Council v Waikato Electricity Authority Hamilton CP21/93, where His Honour elaborated further on these categories, but did not differ from them.

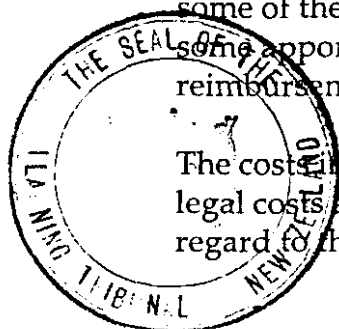
To that we would add that it is important that litigants before this Tribunal exercise a degree of discipline over their case. That is the purpose of the pre trial procedures such as were undertaken in this case. They were intended to narrow the issues, and ensure that all parties knew in advance the case they had to prepare, or meet. It is simply not good enough for a party to lead all others to the litigation to believe that an objection will be fought in one way, and then materially alter that stance at the opening of the case without any prior notice to the other parties. We have expressed on a number of occasions how expensive litigation under the RMA is becoming. This case illustrates the point. It behoves all parties to ensure that only the matters truly in issue are litigated. A party who does not exercise that minimal degree of discipline can hardly complain if the are called upon to contribute to costs thereby thrown away by other parties, particularly when offered the opportunity to participate fully in a number of pre-trial conferences to avoid that outcome.

It is clear beyond any doubt that if the appellant had made it plain from the outset that he was only challenging one or other of the conditions imposed by the Canterbury Regional Council the course of these proceedings including the hearing would have been quite different and significantly less expensive to the parties. It did not and the parties were therefore obliged to prepare for a fully defended hearing in which the whole question of the resource consent was in issue.

In those circumstances we are satisfied that an award of costs and witness expenses against the appellant relevant to the amount claimed is appropriate.

The amount claimed by the applicant is \$56,808.93 made up of legal costs and disbursements \$24,565.05 and witness expenses \$32,243.88. We have no doubt that some of these costs would have been incurred in any event and we must make some apportionment for that fact. Neither do we think this is a case for full reimbursement of solicitor client costs.


The costs incurred by the Canterbury Regional Council are \$14,213.16. Made up of legal costs and disbursements \$9,597.29 and witness expenses \$4,615.87. Having regard to the contents of the notice on appeal, and the clear intimation by counsel




that all matters were in issue we consider that the witness expenses were properly incurred. We take a similar view about the question of apportionment as we did in the case of the applicant.

Balancing those matters as best we can, we order that the appellant pay to the respondent Canterbury Regional Council the sum of \$8,000 by way of costs, disbursements and witness expenses incidental to this appeal and we order that the appellant pay to the Applicant, Ravensdown Fertiliser Co-operative Limited, the sum of \$25,000 as a contribution to its costs, disbursements and witnesses expenses incidental to the appeal.

DATED at WELLINGTON this 15TH day of November 1994


A A P Willy
Planning Judge



rvrsdown.doc (mo)

PROPOSED CONDITIONS:

SULPHURIC ACID PLANT STACK

- (i) The discharge of sulphur compounds should not exceed 1.5% of the sulphur burned.
- (ii) The concentration of sulphur dioxide shall not exceed 0.13% at any plant load.
- (iii) For a period of up to one hour after sulphur ignition during a cold start, the concentration of sulphur dioxide shall not exceed 0.5% by volume.
- (iv) For a period of up to one hour after sulphur ignition during a cold start, the emission of acid mist and sulphur trioxide shall not exceed 150 mg/m³ expressed as sulphur trioxide (SO₃) corrected to 0°C, 1 atmospheric pressure, dry gas basis.
- (v) The plume from the acid plant stack shall be clear within two hours from sulphur ignition during a cold start.
- (vi) A minimum of at least five full working days notice shall be given to the Group Manager, Regulations and Consents, Canterbury Regional Council of a proposed cold start. Should the cold start not proceed as proposed then variation of the above notice requirement for recommencement of the cold start shall be at the discretion of the Group Manager, Regulations and Consents.
- (vii) The concentration of dust in the discharges from the mill vents shall not exceed 250 mg/m³ corrected to 0°C, 1 atmosphere pressure and a dry gas basis, averaged over one hour.

SUPERPHOSPHATE PLANT STACK

- (viii) The concentration of fluoride in the discharge from the den scrubber stack shall not exceed 70 mg/m³, expressed as F at 0°C 1 atmosphere pressure, dry gas basis.
- (ix) The total fluoride emission from the den scrubber stack and the granulation plant hygiene vents shall not exceed 2kg/hr.
- (x) The total emission of hydrogen sulphide in the discharge from the den scrubber stack shall not exceed 70 mg/m³ 0°C expressed as H₂S, 1 atmosphere pressure, dry gas basis.

SULPHUR MELTING BATHS

- (xi) The sulphur melting baths shall be enclosed and the gases collected shall be discharged to a biofilter. The biofilter shall be designed, installed and maintained to ensure that no sulphur odours are identifiable from the filter bed.

REVIEW

- (xii) The Canterbury Regional Council may on 30 November each year during the term of this consent serve notice on the consent holder of its intention to review the conditions of this consent for the purpose of:

- 2 -

- a. Dealing with any adverse effects on the environment which may arise from the exercise of the consent; or
- b. Requiring the adoption of the best practicable option to remove or reduce any adverse effect on the environment as a result of the exercise of the resource consent; or
- c. Providing for the development of improved odour measurement technology and odour monitoring standards.

OUR REF: GJV4572

conditions noted
Arthur Wilby
13/7/95

**BEFORE THE ENVIRONMENT COURT
I MUA I TE KOOTI TAIAO O AOTEAROA**

Decision No. [2018] NZEnvC 163

IN THE MATTER of the Resource Management Act 1991
AND a direct referral under s 87G of the Act
BETWEEN HOROWHENUA DISTRICT
COUNCIL
(ENV-2016-WLG-000026)
Applicant
AND MANAWATU-WANGANUI
REGIONAL COUNCIL and
HOROWHENUA DISTRICT
COUNCIL
Consent authorities

Court: Environment Judge B P Dwyer
Environment Commissioner J R Mills
Environment Commissioner J A Hodges

Heard: At Levin on 27, 29 and 30 March, with a site visit on 28 March
2017, (March hearing) and 18 and 19 December 2017
(reconvened hearing).
Final Submissions dated 2 February 2018.

Appearances: Mr D Allen and Ms V C Brunton for the Horowhenua District
Council (as Applicant)
Ms S Johnston and Ms J Avery for the Manawatu-Wanganui
Regional Council and Horowhenua District Council (as Consent
Authority)
Ms Ongley for Ngati Whakatere and Ngati Raukawa
Dr Teo-Sherrell for the Water Protection Society
Mr M Smith for Water Environmental Care Association
Mr J Bent (self-represented)
Mr Andrews (s 274 party)



Mr G Thompson (s 274 party)
 Ms C Thompson (s 274 party)
 Mr W Mc Gregor (s 274 party)
 Mr D Roache for Foxton Community Board (s 274 party)

Section 274 Parties:

In accordance with s 274 of the Act, the following became parties to the proceedings:

- William John Bent*
- Foxton Community Board*
- Michael Gavin Knight*
- George Harold Jervis*
- Kelvin Douglas Lane*
- Manawatu Estuary Trust*
- William McGregor (withdrew by way of memorandum dated 28 September 2017)
- Christina Florence Paton (withdrew by way of memorandum dated 30 September 2017)
- Tanenuiarangi Manawatu Incorporated (TMI) *
- Te Taiao O Ngati Raukawa Environmental Unit (withdrew by way of memorandum dated 28 September 2017)
- Te Roopu Taiao o Ngati Whakatere (withdrew by way of memorandum dated 28 September 2017)
- Christine Doreen Toms (withdrew by way of memorandum dated 29 September 2017)
- John Cyril Andrews and Charlotte Henrietta Andrews (withdrew by way of memorandum dated 29 September 2017)
- Water and Environmental Care Association (WECA) (withdrew by way of memorandum dated 4 December 2017)
- Royal Forest and Bird Protection Society of New Zealand Incorporated (Forest and Bird)*
- Water Protection Society (WPS) *
- Shannon Progressive Society*
- Turk's Poultry Farm Limited
- Fish and Game (Wellington Region)
- Frederick John Macdonald
- Geoffrey John Kane



Parties marked with an asterisk participated in the hearing. WECA withdrew from proceedings after reaching agreement with the Applicant and Regional Council on matters relating to the application of the intensive farming provisions of the Manawatu-Wanganui Regional Council (the Regional Council) One Plan. The other parties who withdrew did so after reaching agreement with the Applicant on cultural issues.

Date of Decision: 31 August 2018

Date of Issue: 31 August 2018



INTERIM DECISION

- A: Consents to be granted, subject to the final resolution of conditions.**
B Costs reserved.

Annexures

- 1 Figure EC1 – Indicative Design Concept and Sensitive Receptors, originally included in Court Exhibit 3
- 2 Figure EC2, which was included as Appendix D3 of Mr Lowe’s statement of further supplementary evidence dated 20 June 2017

Structure of decision

This decision is set out in the following parts:

- | | |
|--------|---|
| Part A | Summary of the case and key findings |
| Part B | Background information |
| Part C | The proposal |
| Part D | Key factors taken into account by the Court when assessing the proposal |
| Part E | Assessment of effects on the environment |
| Part F | Statutory analysis |
| Part G | General matters |



Part A

Summary of the case and key findings

[1] This decision relates to applications by the Horowhenua District Council (as Applicant) to the Manawatu-Wanganui Regional Council and the Horowhenua District Council (as consent authority) for resource consents to enable the treatment and discharge of wastewater from the rural township of Foxton, and specifically:

Activities and discharges associated with the receipt, treatment, storage, land application (irrigation) and general management of wastewater received at the Foxton Wastewater Treatment Plant from Foxton and a temporary wastewater discharge to Foxton Loop while the project is built¹.

[2] The key issue in determining the outcome of the case is the effects of nitrogen on aquatic receiving environments which are regulated in accordance with the Manawatu-Wanganui Regional Council Regional Policy Statement (RPS) and the Regional Plan. Both documents are incorporated as Parts 1 and 2 of a single document known as the One Plan.

- [3] The matters raised by the applications were complex and included:
- (a) The primary resource consent application documents defined wastewater nitrogen and phosphorus loads that would be applied to land but the total load applied (including from intensive farming activities) and resulting discharges that would occur below the root zone were not. These were only set out in one of many supporting documents.
 - (b) The One Plan was developed on the basis of controlling discharges below the root zone using modelled predictions of nitrogen losses using a model known as OVERSEER[®] (Overseer), not applied loads. To enable evaluation of the proposal in terms of the relevant One Plan provisions we must do so in terms of the discharges below the root zone, not the applied loads.
 - (c) By the time the hearing started predicted nitrogen discharge losses below the root zone had increased by more than 20% compared to those predicted prior to the application, due to the publication of a new version of Overseer.



- (d) As a result of expert conferencing the relevant experts recommended new consent limits that involved significant increases in applied nitrogen loads to irrigated areas (in kgN/h/y), compared to the loads in the applications as set out in the following table²:

Land Management Unit ³	Application	Consent limit recommended in revised proposal
1	147	200
2	268	Up to 400
3	244	Up to 400

- (e) Both individually and in combination, (c) and (d) give rise to issues of *vires*.
- (f) There was and remains a lack of certainty on a number of key technical aspects of the project particularly as to the level of nitrogen attenuation that will occur in local soils, making it difficult to reliably predict nitrogen loads reaching different surface water receiving environments now and in the future;
- (g) There is no way currently available to reliably assess the effects of the existing discharge on the Foxton Loop⁴ (the Loop) into which it discharges nor, as a consequence, to determine reliably what environmental benefits will result if the direct discharge is removed as part of the proposal;
- (h) There is no way currently available to reliably determine existing or future effects of treated wastewater discharges from the Foxton Wastewater Treatment Plant (FWTP) on the Manawatu River and Estuary or monitor the benefits of the proposal;
- (i) The original assessment of effects on the environment (AEE) was based on information that was substantially out of date by the completion of the hearing as a result of the many changes that occurred through the process and no updated AEE was provided.
- (j) The Court was advised by memorandum of counsel dated 30 October 2017 (the intensive farming memorandum) that the Applicant, the Regional Council and WECA had been considering the ability of the Court to grant the intensive farming consent for the project. The parties

² From Table 3 of Court Exhibit 3.

³ Refer paragraph [37] below.

⁴ We will give a detailed description of the Foxton Loop and its relationship to the Manawatu River into which it flows later in this decision.



perceived an omission and conflicts and/or uncertainties in the relevant One Plan provisions. The parties considered this raised doubts as to whether or not the Court could grant consent for the intensive farming activity being sought.

[4] The above combination of factors presented difficulties in terms of determining the solution that best meets the purpose of the Act and whether we had sufficient information to make an informed decision on the applications. For the reasons set out later in our decision, we determined that there are methods available to us to address and provide for the technical uncertainties, primarily by requiring significant clarifications and further information prior to and during the hearing process and adopting a risk based approach. We also found that we are not prevented from granting consents.

[5] To provide context to assist in understanding our decision, we note that in relation to the granting of consents for the intensive farming activities:

- (a) Disposal to land is to all intents and purposes the only option available to the Council if it is to meet the directive provisions of Policy 5-11 of the One Plan. Policy 5-11 (Human sewage discharges) provides that:

Notwithstanding other policies in this chapter:

- (a) before entering a surface water body all new discharges of treated human sewage must:
- (i) be applied onto or into land, or
 - (ii) flow overland, or
 - (iii) pass through an alternative system that mitigates the adverse effects on the mauri of the receiving water body.
- (b) There is limited, if any, land within a reasonable distance of Foxton that is ideally suited for the irrigation of treated wastewater, effectively making alternative land disposal sites unaffordable or impracticable for the Foxton community.
- (c) After an extensive consideration of alternatives the Council selected a site it considered to be the best practicable option (BPO). The site is not owned by the Council and will continue to be used for the farming of bull beef (which currently occurs on the site) in conjunction with the treated wastewater discharge process as a term of the arrangement with the owner.



- (d) The ongoing use of the site for farming brings into play the intensive farming provisions of the One Plan. Here, Policy 14-5 is directive and limits maximum nitrogen levels that can be discharged below the root zone (drainage load) from intensive farming activities to those set out in Table 14.2. The particularly relevant requirements of Policy 14-5 are:

In order to give effect to Policy 5-7 and Policy 5-8, intensive farming land use activities affecting groundwater and surface *water* quality must be managed in the following manner:

- (a) The following land uses have been identified as intensive farming land uses:
- (iv) Intensive sheep and beef
- (b) The intensive farming land uses identified in (a) must be regulated where:
- (ii) They are new (i.e., established after the Plan has legal effect) intensive farming land uses, in all Water Management Sub-zones in the Region.
- (e) New intensive farming land uses regulated in accordance with (b)(ii) must be managed to ensure that the leaching of nitrogen from those land uses does not exceed the cumulative nitrogen leaching maximum values for each year contained in Table 14.2. ...

[6] Rule 14-3 provides that new intensive farming activities are controlled activities if they comply with the cumulative nitrogen leaching maximum values for each year contained in Table 14.2. They become restricted discretionary activities under Rule 14-4 if they do not comply with one or more of the conditions, standards and terms of Rule 14-3.

[7] The parties to the intensive farming memorandum contended that Rule 14-4 is in conflict with Policy 14-5 as it provides discretion to exceed the limits that the policy says must not be exceeded. The rule lists discharges that it applies to and, on initial reading, the discharge of treated wastewater appears not to be included. As will be seen later in our decision, biosolids is listed in Rule 14-4, which the One Plan defines as “a sewage or sewage sludge, derived from a sewage treatment plant”. Based on this definition, the rule includes the discharge of treated wastewater derived from the FWTP.

[8] The proposal cannot meet the applicable maximum cumulative level of 13 kilograms of nitrogen per hectare per year (kgN/ha/y) leaching from the root zone as a whole of farm average, as set out in Table 14.2 of the One Plan.



[9] Our understanding of the amount by which the proposal would not meet the nitrogen limits in Table 14.2 changed as new evidence was provided through the process. At the time of application, the average predicted drainage load was 28 kgN/ha/y. The change in Overseer predictions increased this to 34 kgN/ha/y. This load included an element of double counting, which we refer to later, and which we assess later as an over-estimate of nitrogen losses of 10% and possibly more from the farm area. By removing this double counting from the application load, the whole of farm average we are to consider is 25 kgN/ha/y or possibly somewhat less, based on the original load applied for.

[10] We sought clarification from the Applicant as to which proportion of the losses was sourced from wastewater and which from farming. Mr HT Lowe (expert witness for the Applicant) advised that it was not possible “to drill down” fully using the Overseer model but, based on his predictions⁵, our best assessment is that the two sources contribute approximately the same nitrogen losses below the root zone. On that basis the contribution from intensive farming on its own might not exceed the Table 14.2 limits, and if it did, it would only be by a small amount.

[11] We found that there is no practicable way in which the directive provisions of Policies 5-11 and 14-5 can both be met by the proposal. We are also satisfied that there are no practicable alternative sites available where it would be possible to meet both policies in circumstances where intensive farming was carried out on the same site. While we considered possible mitigation options in some detail, we are satisfied they do not offer a realistic method of satisfying the requirements of both policies.

[12] For the avoidance of doubt, we note that the conflict perceived by some of the parties between the two directive policies arises because of the Applicant’s choice to combine treated wastewater discharge to land with an existing bull beef farming activity. Alternative farming practices could be used that would avoid any such conflict. The two policies are clear in what they seek to achieve in terms of managing effects from two different types of activity and while they affect what can be done in this case they are not, in our view, in conflict as matters of general principle. The difficulty which we have is in giving effect to both policies in the uncommon situation

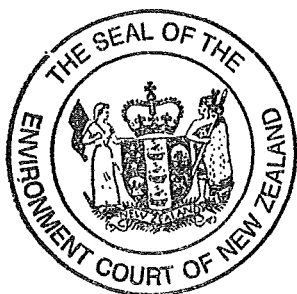


Evidence in response to the Court’s minute of 27 November 2017, at paragraphs 11 and 12.

where treated wastewater is discharged in conjunction with this particular farming activity.

[13] We determined, after evaluation of the evidence and planning provisions together with consideration of options and effects, that the purpose of the Act will be met best by granting the consents. While we explain our reasoning in more detail in the body of our decision, we consider the reasons are sufficiently important and potentially of much wider significance than the current applications alone, to summarise them here. The primary reasons are:

- (a) The proposal represents the best practicable option (BPO) which we tested in some detail as part of our questioning and evaluation, specifically recognising that the application site is only available if the existing bull beef operation continues;
- (b) We are satisfied that the proposal will result in positive environmental outcomes as a result of substantial reductions in (if not almost complete removal) of most contaminants from the Loop, with nitrogen being the only contaminant remaining of potential concern;
- (c) The proposal will result in a reduction in current nitrogen discharge levels much greater than the average sub-catchment-wide reduction necessary to meet the relevant One Plan water quality target;
- (d) We tested the robustness of (c) by undertaking a sensitivity analysis of the evidence before us to assess the risk of removal being less than the reductions assumed above and assuming the future nitrogen load reaching the Manawatu River and Estuary could be 30% greater than predicted in the final evidence. This still left a significant “factor of safety” in terms of exceeding the average reduction required to meet the relevant sub-zone-wide One Plan water quality target;
- (e) We do not consider that being greater than the necessary average reduction on its own (while positive) is sufficient to justify the granting of consents. The proposal must also be considered in light of the extent of the “factors of safety” involved and other specific circumstances and relevant plan provisions applying to the current applications – put another way, being a greater reduction than the target alone is not sufficient to get the applications “over the line”;
- (f) The proposal contributes positively towards addressing surface water quality degradation, one of four keystone environmental issues identified



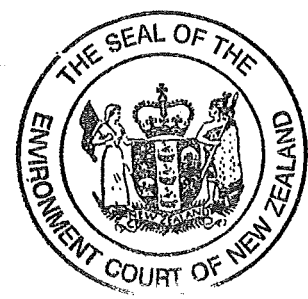
- as a matter of focus for the One Plan and discussed in more detail later in our decision;
- (g) The proposal includes appropriate conditions to protect threatened indigenous biodiversity, the only other of the four keystone environmental issues that is relevant to these applications;
 - (h) The proposal is largely in accord with the RPS, and specifically:
 - (i) The proposal meets the Objective and relevant Policies of Chapter 2 of the One Plan relating to Te Ao Maori and, in particular, addresses a fundamental concern of tangata whenua that human sewage should be discharged to land and not to water;
 - (j) The proposal recognises and provides for the establishment, operation, maintenance and upgrading of infrastructure and other physical resources of regional importance and is in general accordance with the provisions of Chapter 3 of the One Plan; and
 - (k) Other than the provisions of Policy 5-8(a)(iii) relating to new intensive farming activities, the proposal satisfies the relevant Objectives and Policies of Chapter 5 of the One Plan relating to water and, in particular, meets the directive Policy 5-11 - the discharge of treated wastewater to land⁶.

[14] At a One Plan level the most difficult aspect of the proposal is that although it is largely in accord with the relevant provisions of the Regional Plan, it does not meet the nitrogen maximum discharge levels in Table 14.2, which Policy 5-8(a)(iii) and Policy 14-5 require “must” be achieved.

[15] We address this matter in more detail later in our decision, but by way of a summary, our key findings in relation to Chapter 14 (and consequently Policy 5-8(a)(iii)) are that:

- (a) The proposal is consistent with the relevant Chapter 14 Objective, but is contrary to Policy 14-5 which is intended to give effect to the Objective;
- (b) Although *on its face* the Policy requires absolute adherence to the Table 14.2 limits, non-compliance with the Table is not a prohibited activity. Rule 14-4, which is intended to give effect to the Objective and the

⁶ As explained later in our decision, Policy 5-6(b) applies in relation to groundwater, and Policy 5-8 is a requirement to regulate discharges, which is largely the responsibility of the Regional Council and is addressed later in our decision in relation to Chapter 14 of the One Plan.



- Policy, provides discretion to exceed the limits for some types of discharge. There is ambiguity in that regard;
- (c) Chapter 1 of the One Plan states that “Run-off of nutrients, sediment and bacteria from farms is now the single largest threat to water quality in the Region.” (our emphasis). Policy 14-5 is intended to manage nutrient discharges from intensive farming and be applied on a consistent basis across the whole of the region;
 - (d) Discharges of treated human wastewater to land occur on a limited basis by comparison and it is difficult for us to see how they can be adequately provided for as part of a single region-wide rule included in the One Plan to control discharges from intensive farming;
 - (e) There are inconsistencies and a gap in the One Plan with regard to these matters.

[16] The expert planning evidence was that the applications before us are discretionary, based on the bundling concept. We accept that evidence which means we are required under s 104(1)(b)(v) and (vi) of the Act to have regard to the relevant regional policy statement (RPS) and plans. However, because the directive provisions of Policies 5-11 and 14-5 cannot both be met in this case and the ambiguity and gap we have identified, we have also had regard to Part 2 of the Act in our considerations.

[17] We are satisfied that the proposal is in accordance with the relevant RPS and plan provisions (except those relating to intensive farming), the relevant provisions of the National Policy Statement for Freshwater Management 2014, the New Zealand Coastal Policy Statement and the relevant provisions of sections 6, 7 and 8 of the Act, and that granting consents better meets the purpose of the Act than declining them.



Part B

Background information

Introduction

[18] The FWTP is owned by the Horowhenua District Council and serves the community of Foxton. It is situated south west of Foxton in an area called Matarakapa which is physically separated from the town and its environs by the Loop which is part of the Manawatu River. The FWTP is based on a three-stage oxidation pond system with the first pond becoming operational in around 1976 and the other two in 1997⁷. Treated wastewater is discharged by way of a pipe and drain system directly to the western arm of the Loop.

[19] The Loop was the original bed of the Manawatu River. Following a breach of what is known as the Whirokino Cut in 1944 the river took a more direct route to the sea leaving the Loop as a brackish tidal backwater. The upstream (eastern) end of the Loop is now cut off from the river. The lower (western) end of the Loop is connected to the river and tidal influences occur back up most of the Loop, indicatively to the general area where it meets the Whirokino floodway towards the upper part of the eastern arm of the Loop.

[20] The Council proposes to remove the direct discharge to the Loop by spraying treated effluent onto surrounding farm land owned by a third party and is seeking consent to discharge all treated wastewater to land. The owner intends to continue the existing use of the land for beef farming. Because the land is presently not irrigated but will become irrigated by the treated wastewater discharge the beef farming constitutes a new intensive farming land use. For the sake of completeness, we record that intensification of the beef farming operation above its present stocking levels will in fact occur as a result of the irrigation.

[21] The general site locality is shown on Figure A1 reproduced below from the Section 87F Report prepared by Mr M L St Clair⁸.

[22] The Horowhenua District Council is both the Applicant for the resource consents applied for and the consent authority for the District land use consents

⁷ Saidy EIC at para 39.
Director of Hill, Young, Cooper, Planning and Resource Management Consultancy, giving evidence for the Regional Council.



required to give effect to the proposal. For the purposes of our decision we have described the Council as Applicant as *the Applicant* and as the consent authority as *the District Council*. The Manawatu-Wanganui Regional Council (*the Regional Council*) is the consent authority for regional consents.





<table border="1"> <tr> <td>Authorised</td> <td>John</td> <td>2018</td> <td>Environment</td> </tr> <tr> <td>Checked</td> <td>John</td> <td>2018</td> <td>Environment</td> </tr> <tr> <td>Approved</td> <td>John</td> <td>2018</td> <td>Environment</td> </tr> </table>		Authorised	John	2018	Environment	Checked	John	2018	Environment	Approved	John	2018	Environment		10/17/18 FOXTON WASTEWATER TREATMENT PLANT CONSENTING	Drawing No. FIGURE A1 FOXTON WWTP LOCATION MAP	Scale A1 - MIS A3 - MIS
Authorised	John	2018	Environment														
Checked	John	2018	Environment														
Approved	John	2018	Environment														
Date 10/17/18	Project Foxton	Title Discharge Consent	Map No. 10172-01	Author R.A.	Date of Issue -												



Designation of the treatment plant site and previous resource consents

[23] The site of the FWTP is designated in the Horowhenua District Plan for oxidation pond purposes. No changes to the designation are proposed to authorise the new works.

[24] The Regional Council issued the following consents in 2009 and they expired on 1 December 2014.

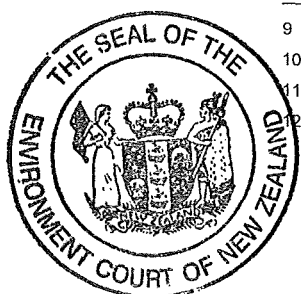
Discharge permit 103925 for pond treated wastewater and industrial wastewater to the Manawatu River (Foxton Loop) at a rate of up to 2,000 m³/d; and

Discharge permit 103926 for wastewater and industrial wastewater to land at a rate of up to 2,000 m³/d as a result of seepage from the existing unlined wastewater (sewage) treatment ponds at the Foxton Wastewater Treatment Plant.⁹

Short-term consent application

[25] The Applicant established a Foxton Focus Group (the Focus Group) with its first meeting in February 2014 to provide a forum for interested members of the community to participate in a process “to try and agree a preferred site for the discharge of treated wastewater from the FWTP.”¹⁰

[26] Ngati Whakaterere (a member of the Focus Group) requested a pause in the process to allow time to consult with the other iwi which it represents and identify a preferred site for the Project. The Applicant agreed and the Focus Group supported the making of a short-term consent application to allow Ngati Whakaterere’s request to be accommodated on an appropriate statutory basis. On 29 August 2014 (more than three months before the expiry of the Discharge Permits 103925 and 103926) the Applicant lodged a renewal application seeking a 19-month term¹¹ which effectively allowed for the continuance of the current discharge regime while a sustainable long-term discharge solution was identified. The short-term renewal applications (consent numbers 107277 and 107278) were accepted, put on-hold by the Regional Council¹² and remain on hold.



⁹ HG Edwards EIC at para 37.
¹⁰ G Saily EIC at paras 8, 9, 12 and 13.
¹¹ Closing submissions for the Applicant, paragraph 415.
¹² Edwards EIC at paras 38 to 40.

The current applications before the Court

[27] The Applicant applied for the following resource consents from the Regional Council and the District Council on 30 October 2015¹³and ¹⁴:

Regional Council consents applied for:

- (a) Land Use Consent for large scale earthworks (3 years): large scale land disturbance associated with upgrading and the additional storage to the existing FWTP, including trenching for the installation of irrigation reticulation (required under Rule 13-2 of the One Plan – controlled activity).
- (b) Discharge Permit to treat and store wastewater and the associated discharge of treated wastewater to land which may enter water (35 years): discharge treated wastewater from the floor and walls of the FWTP oxidation and storage ponds (required under Rule 14-30 of the One Plan – discretionary activity).
- (c) Discharge Permit to discharge aerosols and odour to air (35 years): discharge of aerosols and odour to air associated with the receipt, treatment and storage of wastewater from the FWTP and discharge of treated wastewater from the FWTP onto and into land by irrigation required under Rule 15-17 of the One Plan – discretionary activity).
- (d) Discharge Permit to discharge treated wastewater to land which may enter water (35 years): discharge of treated wastewater from the FWTP onto and into land by irrigation (required under 14-30 of the One Plan – discretionary activity).
- (e) Discharge Permit to discharge treated wastewater to water (3 years): discharge of up to 2,000 m³/day of treated wastewater from the FWTP oxidation ponds to the Loop (required under 14-30 of the One Plan – discretionary activity).
- (f) Land Use Consent for an intensive farming activity (unlimited): the irrigation of wastewater to land such that the use of the land is an intensive farming unit as defined under the One Plan (required under Rule 14-4 of the One Plan – restricted discretionary activity).



¹³

Resource Consent Applications and Assessment of Environmental Effects, October 2015 and closing submissions for the Applicant, paragraph 1. Rule details as set out in Section 1.5 of the Consent Application and AEE.

District Council consents applied for:

- (a) Land Use Consent for the erection of structures on a Coastal Natural Character and Hazard Overlay Area to enable the establishment and operation of a network utility activity (required under 19.4.7 (a) of the Horowhenua District Plan – discretionary activity); and
- (b) Land Use Consent for the establishment, operation and ongoing maintenance of a network utility in a Flood Hazard Overlay Area, including irrigation activity (required under 19.4.8 (ii) of the Horowhenua District Plan – discretionary activity).

Permitted activities

[28] For the sake of completeness we note that the following permitted activities form part of the proposal in addition to those for which consent is required:

- (a) Earthworks associated with installing and maintaining underground reticulated services under Rule 22.1.5(c) of the Horowhenua District Plan;
- (b) Where network utilities or associated structures are located underground, the ground surface and any vegetation disturbed in the course of installation shall be repaired or replaced as soon as practicable after installation under Rule 22.1.6(a) of the Horowhenua District Plan;
- (c) Structures associated with network utilities shall not exceed 3m height on rural zoned land shown as an ONFL under Rule 22.1.8(a)(vi) of the Horowhenua District Plan; and
- (d) Installation of underground network utilities (new) in a Flood Hazard Overlay under Rule 19.1(o)(iv) of the Horowhenua District Plan.

The activities to which the applications relate:

[29] As already noted above, the activities to which the applications relate were described in the applications as follows¹⁵:

Activities and discharges associated with the receipt, treatment, storage, land application (irrigation) and general management of wastewater received at the Foxton Wastewater Treatment Plant from Foxton and a temporary wastewater discharge to Foxton Loop while the project is built.



¹⁵ Form 9, Section 2.

Applications referred to the Environment Court

[30] Following a request from the Applicant, these applications were referred to the Environment Court for determination pursuant to the provisions of s 87G of the Act¹⁶.

Submissions received

[31] A total of 67 submissions was received, one of which was later withdrawn. These are summarised in the s 87F reports prepared by Ms S K Cook and Mr St Clair together with details of the process followed. Mr St Clair summarised the general position of the submissions as follows:

General position of submission	Total
Oppose	38
Support	22
Both support and oppose	3
Neutral	2
No stated position	1

[32] We have reviewed these summaries and each submission individually. We have considered all matters raised in submissions when making our decision.

Written approvals

[33] Written approvals were received:

- (a) For the proposal as originally lodged from Mr G Jarvis, who is the owner of the land that surrounds the FWTP and his wife, Ms Kennedy¹⁷;
- (b) From the Trustees of the TM and EM Knight Family Trust (the Knight Family Trust) which is the owner of the land on which treated wastewater is proposed to be irrigated and which will continue to farm the land.¹⁸

Overview of the application process and matters arising

[34] A pre-hearing conference was held on 16 August 2016¹⁹ following which the Court indicated its intention that a hearing would take place in the week of 12

¹⁶ Letter dated 29 March 2016 from the Regional Council and the District Council
¹⁷ Section 87F Report, Ms S Cook, paragraph 3.4.
¹⁸ Section 87F Report, Ms Cook, paragraph 3.5.
¹⁹ First Case Management Minute dated 2 August 2016.



December 2016²⁰. A series of delays in proceedings occurred at the request of different parties, while legal aid was sought²¹, engagement of expert witnesses was arranged and difficulties relating to mediations and expert conferencing were resolved²². A hearing finally commenced on 27 March 2017 but was not completed within the allocated time.

[35] A date to reconvene the hearing was set for 16 May 2017. A series of further delays occurred at the request of the Applicant to allow further consultation to take place with a number of parties. While the Court was concerned at the continuing delays, a number of extensions were granted, which ultimately resulted in memoranda lodged in September 2017 advising that matters at issue between the Council and a number of the parties had been resolved, and that Te Taiao O Ngati Raukawa, Te Roopu Taiao o Ngati Whakatere, William McGregor, John Cyril Andrews and Charlotte Henrietta Andrews, Christina Florence Paton and Christine Doreen Toms had withdrawn from proceedings.

[36] The reconvened hearing was set down for 18 to 21 December 2017. It proceeded in accordance with that timetable and was completed on 19 December 2017. Closing submissions were made by a number of submitters, before final submissions on behalf of the Applicant were made on 2 February 2018.

The proposal on which this decision is based

[37] For the avoidance of doubt, the proposal used as the basis of our consideration of the applications includes:

- (a) The on-going use of the existing treatment pond system for treating wastewater with the addition of inlet screening and with continuing seepage from the unlined pond bottom and sides;
- (b) Continuation of the existing discharge to the western arm of the Loop for a period of up to three years to allow for the new land application and treated wastewater storage systems to be constructed and become operational;
- (c) Outlet pond controls to ensure the daily discharge limit of 2,000 m³/d to the Loop is not exceeded while that discharge continues;

²⁰ Court Minute dated 16 August 2016.

²¹ Fifth Case Management Minute dated 20 September 2016.

²² Various Case Management Minutes (6 to 22) between October 2016 and February 2017.



- (d) Provision of 50,000 m³ of treated wastewater storage (to maximise opportunities for the efficient disposal of treated wastewater to land), some within a new storage pond having a minimum capacity of 20,000 m³ (within the existing area designated for sewage treatment plant purposes) and some in the existing oxidation ponds after appropriate upgrading;
- (e) Development of three irrigation areas within what are called Land Management Units (LMU), generally as shown on the attached Figure EC1 – Indicative Design Concept and Sensitive Receptors, originally included in Court Exhibit 3 and reproduced as Annexure 1 of this decision and more specifically:
- LMU 1 – a total area of 33 ha of which 18 ha is proposed for irrigation, leaving a contingency area of 15 ha;
 - LMU 2 – a total area of 41 ha of which 37 ha is proposed for irrigation, leaving a contingency area of 4 ha; and
 - LMU 3 – a total area of 12 ha of which 8 ha is proposed for irrigation, leaving a contingency area of 4 ha.
- (f) Provision of a range of irrigation equipment and ancillary works such as pipelines, pipeline drains, irrigators located approximately three metres above ground, flow meters, valves, monitoring bores and measuring equipment; and
- (g) Cessation of all direct discharges of treated wastewater to water within three years.

[38] We will return to the detail of some of these proposals in due course.

Issues to be considered

[39] The principal issues arising in this case are:

- (a) Resolution of the matters relating to the One Plan Provisions set out in Part A (above);
- (b) The effects of nitrogen on the aquatic receiving water environments;
- (c) The effects of the proposal on the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga (s 6(e) of the Act), and on kaitiakitanga (s 7 (a) of the Act), and the requirement to take into account the principles of the Treaty of Waitangi (s 8 of the Act).



- (d) How best to address the issues around uncertainty identified in paragraphs [3](f) to (h);
- (e) What is the BPO for the proposal.

[40] We note for completeness that the overall list of issues raised by different parties and requiring consideration included, in addition:

- (a) The adequacy of the overall consultation process;
- (b) The adequacy of the consideration of alternatives;
- (c) The management of wastewater and the plant generally, including wet weather flows, options for enhancing nitrogen removal, pond seepage and the quality and storage of treated wastewater;
- (d) The proposed irrigation system and the inter-relationships between farm and irrigation management;
- (e) Groundwater flow directions within the overall site and the attenuation of nitrogen within the soils and groundwater system;
- (f) The effects of nitrogen and phosphorus on groundwater and different surface water receiving environments;
- (g) The effects of other contaminant discharges;
- (h) The management of air discharges to control odour and effects on public health;
- (i) Appropriate conditions and term, in the event that we were minded to grant consents.

[41] A number of the issues were largely addressed through evidence including joint witness statements (JWS) with broad agreement between experts. We address such issues in our decision only to the extent necessary to provide clarity as to our reasons for taking the approach we have.

[42] Before discussing individual issues, we first address the relevant plan provisions and our interpretation of how they are to be applied to this case as that is fundamental to the determination of the applications.

One Plan Issues

Preamble

[43] As indicated in paragraph [3](j) above, the Court was advised by way of the intensive farming memorandum that the Applicant, the Regional Council and WECA had considered the ability of the Court to grant the intensive farming consent for the



project. The reason the issue arises was stated as being due to the leaching maximums in Table 14.2 of the One Plan being exceeded when the policy direction for new intensive farming provides that the leachate maximums must not be exceeded²³. The intensive farming memorandum noted that the issue gained particular prominence following the Environment Court's decision of *Wellington Fish and Game Council v Manawatu-Wanganui Regional Council* [2017] NZEnvC 37. In very general terms this addressed the way in which the One Plan provisions were being applied by the Regional Council when processing resource consent applications.

[44] In view of the significance of this issue (and while we have addressed it in summary form earlier in our decision) we consider it here in some detail to provide us with a framework for proceeding with the rest of our decision. For the same reasons, we consider in this section:

- (a) The relevant statutory and planning provisions relating to the BPO, to ensure we can attribute appropriate weight to them;
- (b) An issue of scope arising because the Applicant is now seeking to apply and discharge greater quantities of nitrogen than were originally calculated.

We do not undertake our overall statutory analysis until later in our decision.

The position of the parties to the intensive farming memorandum

[45] The intensive farming memorandum noted that, adopting the *R J Davidson Family Trust*²⁴ approach²⁵:

- (i) there are inconsistencies within the One Plan whereby, in relation to the Project, the provisions seeking removal of human wastewater discharges to water and providing overall enhancement of water quality conflict with the provisions relating to new intensive farming and the nitrogen leaching maximums; and/or
- (ii) there is a gap in the One Plan in that the intensive farming provisions do not 'cover the field' in relation to activities where treated human wastewater is being irrigated to land.

²³

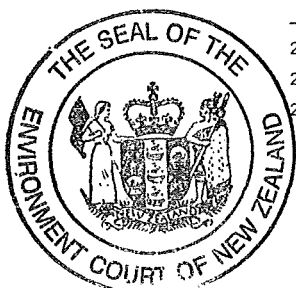
The intensive farming memorandum dated 30 October 2017 at 6.

²⁴

R J Davidson Family Trust v Marlborough District Council [2017] NZHC 52.

²⁵

At paragraph 8(f).



[46] The parties went on to note that they agreed “that either option [above] enables the Court to refer to Part 2, and the effects of the Project as a whole, when considering whether or not the resource consent for the intensive farming element of the Project should be granted”²⁶.

[47] The memorandum also pointed out (inter alia) that despite the policy direction that the nitrogen leaching maximums in Table 14.2 must not be exceeded, Rule 14-4 of the One Plan provides for consent to be granted for some such situations as a restricted discretionary activity. Key matters of discretion include:

- (b) the extent of non-compliance with the cumulative nitrogen leaching maximum specified in Table 14.2; and
- (c) measures to avoid, remedy or mitigate nutrient leaching, faecal contamination and sediment losses from the land.

[48] At paragraph 23 of the memorandum, the parties record that:

When considered on its own, rather than as part of the wider wastewater project, the new farm intensification component of the Project would be unlikely to overcome the policy framework.

[49] Mr Allen (counsel for the Applicant) restated the key issues in his opening submissions at the reconvened hearing. In particular, he stated at paragraph 55(a) (v) and (vi) that:

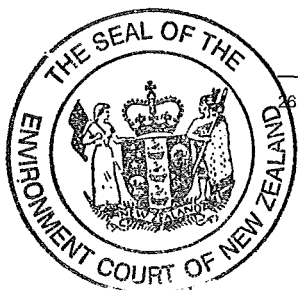
There is an inherent conflict between the intensive farming land use policy framework that requires compliance with the Table 14.2 values and the rule framework that recognises exceedances and enables consideration of the extent of them.

and

However, in this case, as a bundled discretionary activity, the Court must look at the Project in light of all relevant objectives and policies of the One Plan.

[50] In her opening submissions for the consent authorities, Ms Johnston noted that there is no dispute that the overall activity status is discretionary and we agree. She also addressed the question of whether there is a need to refer back to Part 2 and referred to *King Salmon* in relation to plan-making and to *Davidson* in relation to

Intensive farming memorandum at paragraph 8(g).



resource consent applications²⁷. She also referred to *Blueskin Energy Limited v Dunedin City Council*²⁸ and other cases that followed *Davidson*.

[51] Broadly speaking Ms Johnston supported the position of Mr Allen and (in summary) submitted that the intensive farming and water strategy provisions are in conflict and are “pulling in different directions” and cannot be reconciled without being inconsistent with the BPO. She also submitted there is uncertainty as to the meaning and scope of Rule 14-4 and that that the One Plan does not cover the field when considering land application of wastewater.

The Court's approach to the issue

[52] Firstly, we record that we were given no indication of the significance of this issue from our pre-reading of the AEE, the planning report, the s 87F reports, the evidence of the Applicant's and Regional Council's planning experts, the planning joint witness statement (JWS) or opening legal submissions by counsel for the Applicant. While we acknowledge the statutory declaration relating to the application of the One Plan by the Regional Council was issued only recently²⁹, the plan provisions have not changed. We found the late identification and the omission of any reference to this key planning issue in the documentation provided to the Court by the Applicant and Regional Council, surprising to say the least.

[53] Secondly, we record that we issued our thirty first case management minute on 27 November in response to the intensive farming memorandum. We invited responses from the Applicant and all parties and these were received from the Applicant, the consent authorities, WPS, Mr John Bent and the Manawatu Estuary Trust. We considered all memoranda and legal submissions received in response and took them into account in our decision together with all other evidence of relevance.

[54] The starting point for our evaluation was the provisions of the One Plan as a whole. We looked first at the overall outcomes the One Plan is seeking to achieve, rather than considering objectives and policies on an individual basis, somewhat in isolation of each other.

²⁷ Opening submissions, paras 2.10 and 2.11.

²⁸ *Blueskin Energy Limited v Dunedin City Council* [2017] NZEnvC 150. Opening submissions, para 2.12.

²⁹ *Wellington Fish and Game Council v Manawatu-Wanganui District Council* [2017] NZEnvC 37.



Overall plan directions

[55] Chapter 1 of the RPS “sets the scene.” It identifies the challenge for the Regional Council and the region as being “to strike the ideal balance between using natural resources for economic and social wellbeing, while keeping the environment in good health.” It states that the Regional Council’s approach in the Plan “is to focus its resources on making significant progress on the four biggest environmental issues identified for the Region.”³⁰ It identifies “four keystone environmental issues” as “surface water quality degradation, increasing water demand, unsustainable hill country land use and threatened indigenous biodiversity.”³¹

[56] While threatened indigenous biodiversity is relevant to our decision, the issue of “surface water quality degradation” is unequivocally the keystone issue on which we must focus our attention. For reasons that will become clear later in our decision, we note that this issue is focussed on surface water quality not groundwater quality.

[57] In defining “the problem”, Chapter 1 states that “Run-off of nutrients, sediment and bacteria from farms is now the single largest threat to water quality in the Region.” (our emphasis).

[58] Chapter 1.5 sets out the Regional Council’s approach to “Working towards a better future” and records that “To make progress on the Big Four issues, a number of changes to the way natural resources are developed and used will need to be made.” It goes on to state that:

The Regional Council holds the view that:

- (i) working with people and communities to evaluate and deliver local solutions for local issues is the preferred approach to resource management
- (ii) solutions need to be practical, appropriate to the scale of the problem and affordable for ratepayers and communities in the Region. (our emphasis)

[59] Chapter 1 points the reader to look for objectives, policies and methods that address this keystone issue in Chapter 5 and rules in Chapter 14³². We note that interestingly this refers to the rules in Chapter 14, not the objectives and policies.

³⁰ One Plan Section 1.1.
³¹ One Plan Section 1.3.
³² Top of page 1-3 under the heading of “Look For”



[60] Before turning to key Chapters 5 and 14, we first consider what the One Plan intends to be included within the definition of intensive farming activity. We started by referring to the Glossary which does not include any definitions that assist us to understand what is meant by run-off from farms and from agricultural land nor by intensive farming in general. The only definitions of relevance are:

Cumulative nitrogen leaching maximum means the total kilograms of nitrogen leached per hectare per year for the total area of a farm (including any land not used for grazing) and is calculated using the values for each land use capability class specified in Table 14.2 (Our underlining).

Intensive sheep and beef farming refers to properties greater than 4 ha engaged in the farming of sheep and cattle, where any of the land grazed is irrigated (Our emphasis).

[61] Policy 14-5 (a) provides that the following land uses have been identified as intensive farming land uses:

- (i) Dairy farming;
- (ii) Commercial vegetable growing;
- (iii) Cropping; and
- (iii) Intensive sheep and beef;

[62] Rules 14-1 to 14-4 list the discharges that are authorised as part of land use consents for intensive farming with different activity statuses. They are all agriculture related with the exception of biosolids. The discharge of treated wastewater is not listed, however the One Plan defines biosolid as:

a sewage or sewage sludge, derived from a sewage treatment plant, that does not include animal effluent or products derived from industrial wastewater treatment plants, and that has been treated or stabilised to the extent that it is able to be safely and beneficially applied to land (our emphasis)

We note that sewage is defined in the Oxford English Dictionary as “Waste water and excrement conveyed in sewers.” We interpret this to mean both the liquid and solid components of untreated wastewater so that both are encompassed in the definition of biosolids.

[63] The One Plan definition of biosolids appears to be a modified version of the definition included in the glossary of the Ministry for the Environment Biosolids



Guidelines³³. This also refers to “a sewage or sewage sludge derived from a sewage treatment plant” (our emphasis). We find the inclusion of “sewage” to be confusing and somewhat misleading as the first words in Section 1.1 of the MFE Guidelines headed “What are biosolids?”, states “Biosolids are sewage sludges or sewage sludges mixed with other materials ...” which is consistent with common usage of the term which relates to the solid component of sewage not the liquid component. Ultimately nothing turns on the inclusion of liquid sewage in the definition of biosolid but it does introduce an element of confusion.

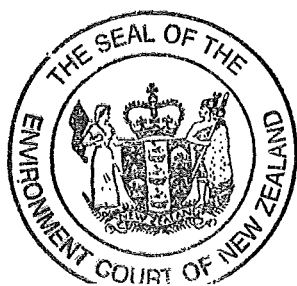
[64] Irrigation of treated wastewater onto dairy farms is not practised generally in New Zealand because of concerns around effects on public health and effects on local or international markets for the farm products. The same concerns are likely to apply to intensive farming activities involving commercial vegetable growing and probably cropping. While we received evidence that sheep and beef farming activities are not subject to the same public health concerns as the other three listed intensive farming activities, there is nothing in the documentation which we saw which suggests that the One Plan explicitly addressed the situation where the irrigation of treated wastewater and intensive farming activities would both occur on the same land area. There is certainly a paucity of policy guidance in the One Plan assisting our decision making in that situation. We do not say that in a critical sense as the combination of the two activities is not something that would necessarily be widely anticipated. We note that neither of the two treated wastewater plant discharges in the Manawatu region which the Court has previously considered (Shannon and Feilding) involved the combination of treatment plant waste water discharge and intensive farming that occurs in this case. By their very nature treated wastewater discharges from treatment plants are limited in extent.

[65] We acknowledge that Policy 5-8 defines the basis for establishing nitrogen leaching maximums in Table 14.2, which is “to take into account all the non-point sources of nitrogen in the catchment” (our emphasis)³⁴ and “are achievable on most farms using good management practices”³⁵. At face value, this is explicit and unambiguous and includes nitrogen in any situations including those where treated wastewater is applied on land used for intensive farming activities.

³³ Guidelines for the safe application of biosolids to land in New Zealand, Ministry for the Environment, August 2003.

³⁴ One Plan Policy 5.8(a)(i)(A).

³⁵ One Plan Policy 5.8(a)(i)(D).



[66] Against this, it is very clear that the One Plan was prepared on the basis that treated wastewater nitrogen loads will be discharged to land somewhere within a practicable distance of existing wastewater treatment plants because of the strong direction given in Policy 5-11. This could of course occur as irrigation onto land in a way that did not bring the intensive farming provisions into play but in any event the associated nitrogen loads discharged will be in addition to any nitrogen discharges from intensive farming activities in the same general locality.

[67] The One Plan places a high level of importance on regionally critical infrastructure and on avoiding direct discharges of treated wastewater to water. As a consequence, we consider that a degree of caution is required in determining the applications for a treated wastewater discharge using region-wide provisions developed to address a very different set of circumstances and effects – namely the effects of farming activities on water quality. Ms Johnston submitted that such an approach would be inconsistent with the requirement to adopt the BPO. We agree and this is a matter we have focussed on carefully in our decision. It will be seen later in this decision that we agree that the proposal before the Court is the BPO.

[68] Further, we have taken note of the statements set out in Chapter 1.5 of the One Plan that:

The Regional Council holds the view that:

- (i) working with people and communities to evaluate and deliver local solutions for local issues is the preferred approach to resource management
- (ii) solutions need to be practical, appropriate to the scale of the problem and affordable for ratepayers and communities in the Region.

We consider that these provisions relate directly to the concept of BPO to which we will return in due course.

Objective 14-1, Policy 14-5(e) and Rule 14-4(b) of the One Plan

[69] Objective 14-1 of the One Plan provides as follows:

Objective 14-1: Management of *discharges to land and water and land uses affecting groundwater and surface water quality*

The management of *discharges* onto or into *land* (including those that enter *water*) or directly into *water* and *land* use activities affecting groundwater and surface *water* quality in a manner that:

- (a) safeguards the life supporting capacity of water and recognises and provides for the Values and management objectives in Schedule B,



- (b) provides for the objectives and policies of Chapter 5 as they relate to surface *water* and groundwater quality, and
- (c) where a *discharge* is onto or into *land*, avoids, remedies or mitigates adverse *effects* on surface *water* or groundwater.

In our view, a significant feature of the Objective is the requirement to provide for the objectives and policies of Chapter 5 when managing discharges onto land. As noted above, Policy 5-11 of Chapter 5 provides:

Policy 5-11: Human sewage *discharges*

Notwithstanding other policies in this chapter:

- (a) before entering a surface *water body* all new *discharges* of treated human sewage must:
 - (i) be applied onto or into *land*, or
 - (ii) flow overland, or
 - (iii) pass through an alternative system that mitigates the adverse *effects* on the *mauri* of the receiving *water body*, and

The Objective accordingly seeks that achievement of this Policy (inter alia) is provided for.

[70] We have previously referred to the provisions of Policy 14-5(e) of the One Plan which provide that "New intensive farming land uses regulated in accordance with b(ii)³⁶ must be managed to ensure that the leaching of nitrogen from those land uses does not exceed the cumulative nitrogen leaching maximum values for each year contained in Table 14.2." (our emphasis).

[71] The provisions of Policy 14-5(e) are emphasised in Policy 14-6 which requires that when determining applications for resource consent (inter alia) the Regional Council must (our emphasis) "Ensure the nitrogen leaching from the land is managed in accordance with Policy 14-5".

[72] On a plain reading, Policies 14-5(e) and 14-6 preclude the grant of consent to new intensive farming land uses which exceed the maximum cumulative nitrogen leaching values contained in Table 14.2. Use of the word "must" contained in the policies clearly purports to make compliance with the Table 14.2 values obligatory

As the intensive beef farming proposal involving the disposal of biosolids is.



and to preclude the grant of consent to new intensive farming proposals which do not meet the values.

[73] The cumulative nitrogen leaching maximum value applicable to this intensive farming proposal at Matararapa pursuant to Table 14.2 is 13kgN/ha/y. The application was originally based on an Overseer calculated load from the combined waste water discharge and intensive farming activities of 28 kgN/ha/y which was subsequently increased to 34 kgN/ha/y. Plainly these loadings (which we will consider in detail later in this decision) do not comply with Table 14.2 and the Policies appear to require that we must not grant consent to this proposal accordingly. However, on further examination we consider that there is considerable ambiguity and inconsistency in these provisions.

[74] Firstly, in that regard, we note that Policy 14-5 does not state that discharges which do not comply with Table 14.2 are to be prohibited activities nor does any relevant rule provide that to be the case. Section 87A(6) relevantly provides that:

87A Classes of activities

- (6) If an activity is described in this Act, regulations (including a national environmental standard), or a plan as a prohibited activity,—
- (a) no application for a resource consent may be made for the activity; and
 - (b) the consent authority must not grant a consent for it.

[75] We consider that notwithstanding the apparently mandatory provisions of Policy 14-5 (and 14-6), the failure to specifically describe discharges which do not comply with Table 14.2 levels as prohibited activities means that we are not precluded from granting consent to them.

[76] We are strongly reinforced in that view by the provisions of Policy 14-2(b) which relevantly provides that “When making decisions on resource consent applications...” “... the Regional Council must have regard to:

where the discharge may enter surface water or have an adverse effect on surface water quality, the degree of compliance with the approach for managing surface water quality set out in Chapter 5

Accordingly, notwithstanding the apparently clear policy direction that consent must not be given to discharges which do not comply with Table 14.2, a rule (14.4) which is intended to give effect to the relevant policies provides that such discharges are



restricted discretionary activities where one of the matters for consideration is the degree of non-compliance with the Table 14.2 levels.

[77] We are well aware that rules must accord with objectives and policies. At first glance the rule is inconsistent with Policy 14-5 which states that consent must not be granted to discharges which do not comply with Table 14.2 levels, raising an obvious question as to the validity of the rule. However that question must be considered in the context that the policy does not describe such discharges as prohibited activities (nor does any other relevant objective, policy or rule which was drawn to our attention) so they must fall into one of the other classes of activity identified in s 87A for which consent may be granted. One Plan has assigned restricted discretionary activity to those discharges. We consider that the ambiguity between the statement that consent must not be granted to discharges which exceed table 14.2 limits and the failure to provide that such discharges are prohibited activities (as required by s87A(6) if they are to be prohibited) is glaring. On the one hand the Policy provides explicitly that consent must not be granted to such discharges and on the other hand the One plan is structured in a manner which provides that applications for consent can be made and granted for them.

[78] In this particular case the ambiguity is compounded by the unusual situation where we are dealing with the combination of discharge from a waste water treatment plant in conjunction with intensive beef farming which is (perhaps understandably) not directly addressed by any objective or policy. However, Objective 14-1 seeks to provide for the objectives and policies of Chapter 5 as they relate to surface water quality and those objectives and policies require the removal of waste water discharges from surface water bodies. We do not consider that the Chapters 5 and 14 objectives and policies are in conflict but One Plan gives little guidance as to how they are to operate together in this situation. We agree that there is a gap in the Plan in that regard as contended by counsel for the Councils.

Other relevant One Plan provisions

[79] Other One Plan provisions are relevant to different aspects of our decision and we consider these under the appropriate topic headings later. However we note here that WPS placed considerable emphasis on its view that the proposal did not meet the provisions of Policy 5-6 of the One Plan relating to the maintenance of groundwater quality. This has relevance to the effects of the intensive farming provisions and we discuss it in more detail in relation to the effects of the proposal on



groundwater quality later in our decision. To provide clarity on this matter from the outset, we confirm that we are satisfied that the proposal does meet the requirements of Policy 5-6 by way of the exception provisions of Policy 5.6(b).

Use of the Overseer model

[80] We were advised by Mr Lowe³⁷ that the Overseer model has been adopted by the Regional Council as the default model for assessing farming and land management impacts in the One Plan. Controls in the One Plan are based on nitrogen losses below the root zone, as it sets out in Table 14.2.

[81] We were advised by memorandum of counsel for the Applicant dated 20 April 2018 that:

- 3 Neither the Applicant's original consent application nor the responses to the section 92 further information requests included any limitation on the **nitrogen leaching** below the root zone, in other words the nitrogen drainage losses as predicted by any particular version of Overseer.
4. Rather, the application and further information focused on the amount of nitrogen applied both in the wastewater and in fertiliser, being the **nitrogen loading** rates. ...

[82] We could find no reference in the main resource consent application and AEE document to either the total nitrogen application and/or discharge loads sought. Table 6.5 in the document did list applied wastewater nitrogen loads as 71, 270 and 274 kgN/ha/y from LMUs 1, 2 and 3 respectively.

[83] Table 5.1 of an accompanying report LEI, 2015D9 entitled "Foxton Wastewater Treatment Plant Discharge Nutrient Loss and Farm Intensification" set out "Summary of Key N Loss Rates", based on modelling using Overseer Version 6.2.0. The whole farm future discharge below the root zone was assessed as 4061 kgN/y. Mr Lowe addressed this in his evidence-in-chief dated 4 November 2016, and reproduced the same Table 5.1.

[84] Mr Lowe provided further evidence on the subject in his rebuttal evidence dated 21 March 2017, referring to changes to the proposed irrigation system made following a review by Dr D J Horne on behalf of the Regional Council. In Table 1 of

³⁷ Principal Environmental Scientist at Lowe Environmental Impact who gave evidence for the Applicant.



the evidence, he set out proposed land application nitrogen design parameters based on his original design and the revised design following the review, as follows:

Land Management Unit	Initial Regime	Revised regime
1	150	175
2	300	300
3	No limit	300 or 400 in exceptional circumstances

[85] The number of changes that had occurred in relation to nitrogen predictions and other factors influencing nitrogen effects on the environment since the applications were lodged and when we first read the evidence made it difficult for us to understand what implications this had on the effects we were to consider. We sought clarification by way of a request for further information in a minute.

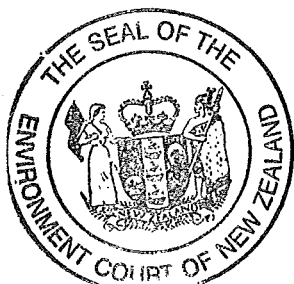
[86] Mr Lowe provided a response to the request at the hearing, entitled “Applicant’s response to the Court’s 23 (*sic*) case management minute”, which became Exhibit 3. This recorded that, as a result of a change in Overseer Version to 6.2.3, the loss of nitrogen from the site had increased from 28 to 34 kgN/ha/y.

[87] Table 3 of Exhibit 3 sets out revised average annual loads predicted and agreed by the relevant experts at expert conferencing on 28 March 2017, which were further increased compared to the loads in the applications, as set out in the table below³⁸. The predicted total loss from the irrigated area increased from the value of 4061 kgN/y in the supporting application documents to 4907 kgN/y, an increase of approximately 20%.

Land Management Unit	Application	Consent limit recommended in revised proposal
1	147	200
2	268	Up to 400
3	244	Up to 400

[88] The many and on-going changes that occurred through the process (particularly after applications were lodged) in nitrogen predictions for both applied loads and losses below the root zone, together with other changes affecting the fate of nitrogen in the receiving environment, presented us with “a moving feast” with a range of challenges when reaching overall conclusions on effects.

³⁸ From Table 3 of Court Exhibit 3.



[89] A significant part of the difficulties arose through the increased nitrogen predictions resulting from the publication of a new version of Overseer which was outside the control of the Applicant and which, in practical terms, does not alter the actual losses of nitrogen to the environment as nothing physically changed. More specifically, there has been no increase in the treated wastewater loads to be discharged to the environment nor an increase in the stocking rate proposed for the farming activity. We acknowledge the validity of a number of the reasons why Mr Lowe prefers regulatory control based on applied nitrogen loads but we have to consider the application in terms of the One Plan which is based on discharges below the root zone, although we consider that assessment on that basis has limitations as a practical or meaningful control mechanism in this particular case.

[90] As will be seen later in our decision, we undertook an assessment of effects of nitrogen on the surface water receiving environment based on the most up-to-date site-specific information available. We did not rely on generic limits (as included in Table 14.2 of the One Plan) that, if met, will allow consent to be granted under the relevant One Plan provisions. For the purpose of assessing effects, we used the higher Overseer Version 6.2.3 predictions as our starting point which are 20% greater than the predicted values in the application. We then considered the information before us on a sensitivity analysis basis to assess the effects if the load reaching the Manawatu River and Estuary was a further 30% greater again, an overall factor of safety of more than 50%. For the reasons set out later we are satisfied that the effects would remain acceptable even under the higher load assumptions.

[91] The assessment of effects was based on discharges arising from three sources. The first of these – the maximum wastewater discharge load that can be applied - can be fixed, the second is the number of bulls that can be run on the farm which can be fixed and the third is fertiliser application which can be managed in accordance with industry good practice, as already proposed by the Applicant. None of these sources has changed in extent since the time of application and cannot increase without a further consent process.

[92] To address any concerns as to vires if consent is granted, we have determined that consent conditions should specify the maximum annual average nitrogen load that can be discharged to land from the treatment plant and the maximum number of animals that can be run on the farm based on those contained in



the application and that fertiliser application must be in accordance with industry good practice. Our assessment of effects was based on these starting points.

[93] As the assessment of effects was based on Overseer modelling and predictions could change in the future, we consider that in the event that consent is granted there is a need to undertake periodic reviews of conditions to check if the original assessment remains valid. With a significant factor of safety in place in this case, we do not consider it would be efficient to require reviews with each new version of Overseer. We consider that five yearly reviews should be undertaken as part of a general review. The Regional Council can waive this requirement if it is satisfied there have been no version changes that are likely to increase nitrogen loss predictions based on Overseer Version 6.2.3 by more than 10%. Should a version change occur between reviews that the Regional Council considers could increase nitrogen load predictions by more than 15% based on Overseer Version 6.2.3 the Regional Council may require an intermediate review of the consents.

[94] The details of how the irrigation system will be managed to meet the consent limits should be set out in a management plan, taking into account any relevant expert recommendations. These details should be subject to the peer review referred to in paragraph [315] (below) and to review as appropriate at the time of any general review undertaken as a condition of consent should consent be granted.

Requirement to adopt the Best Practicable Option

[95] In accordance with Section 108(2)(e) of the Act we may impose a condition requiring the holder to adopt the BPO to prevent or minimise any actual or likely adverse effect on the environment of the discharge and other discharges (if any) made by the person from the same site or source. This is particularly relevant when we are considering the effects of discharges resulting from seepage from the oxidation ponds, discharges resulting from irrigation of treated wastewater from the ponds onto land (both from the same wastewater source) and discharges from beef cattle farmed on the same land used for treated wastewater irrigation.

[96] The Act defines the best practicable option, in relation to a discharge of a contaminant as meaning:

... the best method for preventing or minimising the adverse effects on the environment having regard, among other things, to—



- (a) The nature of the discharge or emission and the sensitivity of the receiving environment to adverse effects; and
- (b) The financial implications, and the effects on the environment, of that option when compared with other options; and
- (c) The current state of technical knowledge and the likelihood that the option can be successfully applied.

[97] Policy 5-6 of the One Plan is relevant as set out in paragraphs [214] and [215]. To meet the requirements of Policy 5-6, and specifically 5.6(b), the BPO **must** be adopted for “the treatment and discharge system” (our emphasis).

[98] Policy 14-2 is relevant and directs the Court as decision-maker standing in the place of the Regional Council to have regard to:

- (d) the appropriateness of adopting the best practicable option to prevent or minimise adverse effects in circumstances where:
 - (i) it is difficult to establish discharge parameters for a particular discharge that give effect to the management approaches for water quality and discharges set out in Chapter 5, and
 - (ii) the potential adverse effects are likely to be minor, and the costs associated with adopting the best practicable option are small in comparison to the costs of investigating the likely effects on land and water

[99] Policy 14-4 (options for discharges to surface water and land) is relevant:

When applying for consents and making decisions on consent applications for discharges of contaminants into water or onto or into land, the opportunity to utilise alternative discharge options, or a mix of discharge regimes, for the purpose of mitigating adverse effects, applying the best practicable option, must be considered, including but not limited to:

- (a) discharging contaminants onto or into land as an alternative to discharging contaminants into water,

[100] The Regional Council’s stated approach to working towards a better future in Chapter 1.5 of the One Plan (reproduced in paragraph [58]) is also relevant. It clearly indicates the Council’s view is that it should work with communities to consider alternatives and find solutions that are “practical, appropriate to the scale of the problem and affordable” which for all practical purposes means adopting the BPO.



[101] For completeness, we note that in its letters dated 22 February 2015 to consent authorities requesting a direct referral of the applications to the Environment Court, the Applicant considered this was justified to enable it to implement the BPO.

[102] In view of the above, we consider there is a clear requirement to and acceptance by the Applicant of the need to adopt the BPO.

[103] For the avoidance of doubt, we consider that in identifying the BPO for this project would need to have regard to:

- (a) The proposal as outlined in paragraph [37];
- (b) As (a) with the existing ponds lined to eliminate or minimise nitrogen losses through pond seepage;
- (c) As (a) with enhanced treatment to remove more nitrogen; or
- (d) A combination of (b) and (c).

[104] When considering effects later in our decision, we considered the benefits of each of the above in terms of avoiding or mitigating the particular effects being considered. We consider the costs of the different options towards the end of our decision.

The consultation process

[105] In paragraphs 8, 9, 12 and 13 of his evidence-in-chief Mr G Saidy (Group Manager Infrastructure Services for the Applicant) noted that:

- 8 HDC was cognisant of wanting to approach the consultation and engagement for the Project in an open, inclusive and meaningful manner. I therefore sought to proactively engage with the community (including iwi) at the outset by consulting on the location and design for the Project.
9. The Project has therefore involved extensive community (including Iwi) consultation through a Foxton Focus Group process, which involved interested members of the community attending seven meetings and workshops from February – December 2014. The purpose of these meetings was to try and agree a preferred site for the discharge of treated wastewater from the FWWTP. These meetings were informed by site visits, field trips to other wastewater treatment plants and the provision of technical reports on the various site options being considered.
12. In addition to the Foxton Focus Group process, separate parallel consultation occurred with iwi groups, in particular Ngāti Whakatere (as the Iwi mandated to speak on behalf of the nine Iwi/hapū of Ngāti Raukawa associated with



Matakarapa), Tanenuiarangi Manawatu Incorporated (on behalf of Rangitaane O Manawatu) ("**Rangitaane**") and Muaūpoko Tribal Authority incorporated ("**Muaūpoko**"). ...

- 13 The outcome of the above process was that all parties (including the Foxton Focus Group members) agreed that direct discharges to the Foxton Loop and Manawatu River should cease.

[106] Mr Saidy provided further evidence on the consultation undertaken in paragraphs 12 to 21 and 48 to 135 of his evidence-in-chief and also described consultation undertaken in relation to the BPO process followed in a number of other paragraphs 136 to 201 of his EIC. The Applicant kept records of all Foxton Focus Group meetings and a number of meetings with Ngati Whakatere, which were provided to the Court and which we consider to be comprehensive.

[107] We see no benefit in repeating any particular features of the consultation process in our decision as they were wide-ranging and thorough. The evidence demonstrates to us that the Applicant went to considerable efforts to consult in a genuine, open way with all parties who wished to be consulted.

[108] In our view, the Applicant met any reasonable expectations for consulting its communities and affected parties and is to be commended for that.



Part C
The proposal

Description of the locality, the proposed irrigation site and aquatic receiving environments

The locality

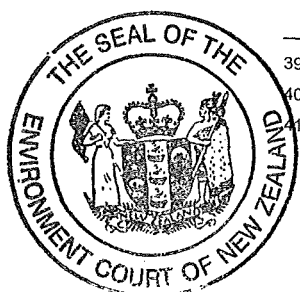
[109] An overall locality plan is included in the introduction to this decision. The FWTP is located close to the proposed irrigation site at Matararapa.

[110] Matararapa is situated within the coastal sand country of Manawatu. The area is dominated by parabolic sand dunes reaching up to 40 m elevation. The River has created alluvial plains near to its course. The result is a mix of flat and gently rolling land with soils ranging from sand dunes to alluvial flats to peat swamps. The predominant land cover on Matararapa is pasture. The dunes typically have poorer producing pasture interspersed with tree cover on their higher flanks and ridges. Pine and kanuka tree species predominate with areas of gorse and blackberry. Land on Matararapa is used for low intensity farming, predominantly bull beef.³⁹

[111] Foxton township is located to the north east and is largely surrounded by farmland. Some two km as the crow flies and to the north-west is the Foxton Beach community. The closest house to the application site currently occupied is located at the southern end of Stewart Street in Foxton. It is 830 m east from the FWTP and about 1 km north-east from any area that is intended to be used for land application of treated wastewater.⁴⁰

[112] There is public access into the locality to the north of the site by way of a paper road. The distance from the nearest point on the paper road to the northern-most irrigated area is approximately 600 m.

[113] People can access a stop bank walkway (which is in the order of 200 m from the nearest irrigation area) for recreational purposes. Farm workers in areas to the east of the irrigated areas can also be present at a similar distance⁴¹.



³⁹
⁴⁰

Lowé EIC at paras 56, 63 and 67.
Lowé EIC at paras 58 and 65.
Cudmore EIC at para 25(c).

The proposed irrigation site

[114] The area of land selected for the Project is owned by the Knight Family Trust. Part of the original 160 ha land area has been lost where the River has migrated northwards in the western half of Whirokino Cut and the remaining land within which irrigation will occur covers an area of 145 ha. The Applicant advised that it was clear from the start of site investigations that some of the remaining Knight Family Trust land area would not be suitable for irrigation due to flooding, terrain/steepness, cultural significance and ecological reasons. However, calculations of the land areas required showed that there was more than sufficient land, even once likely exclusions had been taken into account⁴².

[115] The Applicant's reasons for selecting the site included⁴³:

- (a) Known significant cultural sites can be avoided;
- (b) Areas that are routinely flooded can be avoided;
- (c) The irrigated area is a considerable distance away from the Foxton community;
- (d) There is a large enough land parcel to accommodate the volume of treated wastewater to be discharged to land;
- (e) There is a willing land owner with whom it could work cooperatively avoiding the need to purchase land.

Aquatic receiving environments

[116] Any discharges to land at the site will eventually enter water in the Loop and/or the Manawatu River and subsequently the Manawatu Estuary. The Loop is considered in the evidence mainly in two main parts – the eastern and western arms. The upstream southern end of the Loop is now cut off from the river. The lower western end of the Loop is open to the river and tidal influences occur back up the western and eastern arms a substantial distance, indicatively as far up the eastern arm to the general area where it meets the Moutoa Sluiceway.

[117] Flood events (especially the influence of the Sluiceway) have silted up much of the upstream end of the eastern arm of the Loop. It is now primarily a tidal backwater channel that receives flows from Kings Canal and other Foxton township stormwater and rural drainage systems, including from the Sluiceway during large

⁴² Lowe EIC at para 44.
⁴³ Lowe EIC at paras 43 and 48(b).



flood events. Flow rates through the Loop are generally slow and unable to fully flush contaminants into the Manawatu River/Estuary with each tidal cycle. This combination of factors has degraded the water quality so that it is generally considered unsafe for contact recreation purposes.⁴⁴.

[118] Dr O M N Ausseil^{45,46} gave evidence that the available data for the Loop at the Loop Wharf (albeit limited) indicate that at present:

- (a) The One Plan dissolved reactive phosphorus (DRP) target is largely exceeded by approximately a factor of four and that a 74% reduction would be required to meet the target;
- (b) The soluble inorganic nitrogen (SIN) target is met, with an average concentration of approximately 80% of the target; and
- (c) The ammoniacal nitrogen chronic toxicity target was always met, indicating a low risk of toxic effects from ammonia.

[119] Both Mr L A Brown⁴⁷ and Dr Ausseil record that large beds of the invasive aquatic macrophyte hornwort are present in large sections of the loop.

[120] Mr Brown agreed that the current discharge regime is likely to be having a significant adverse effect on the Loop⁴⁸.

[121] Dr Ausseil considered that even fully removing all treatment plant derived nutrients from the Loop would be unlikely to lead to a measurable reduction in the macrophyte biomass⁴⁹.

[122] Water quality in the Lower Manawatu River at Whirokino was discussed in the evidence of Dr Ausseil and Mr Brown. We note that the One Plan sets targets for DRP and SIN in the River at this location and they apply at river flows below the 20th flow exceedance percentile (20th FEP)⁵⁰. The evidence of Dr Ausseil and 2000 to 2008 data establish that the DRP target was exceeded by approximately 60% while the SIN target was only marginally exceeded (by 6%).

⁴⁴ Lowe EIC at paras 62 and 63.

⁴⁵ Dr Ausseil is a principal water quality scientist with Aquanet engaged by the Applicant.

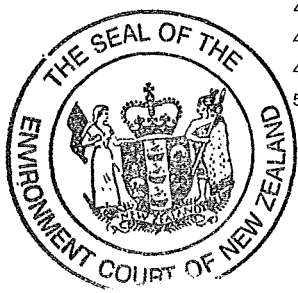
⁴⁶ EIC at para 25.

⁴⁷ Mr Brown is a senior water quality scientist employed by the Regional Council.

⁴⁸ EIC at paras 16 and 17.

⁴⁹ EIC at paras 26 and 27.

⁵⁰ Resource Consent Application and AEE, Executive Summary.



[123] Mr Brown gave evidence that the current treatment plant discharge is a relatively minor contributor to the overall loads and concentrations of nutrients measured in the lower Manawatu River⁵¹. Dr Ausseil also noted that improving water quality trends have been identified with regards to both DRP and SIN in the Lower Manawatu River at Whirokino⁵².

[124] The wider Manawatu Estuary is a wetland site that contains large areas of mudflat, saltmarsh and sand-spit which provide habitat for a wide range of flora and fauna, particularly birds, some of which are regarded as threatened species or critically endangered. The estuary is internationally recognised and protected under the Ramsar Convention.

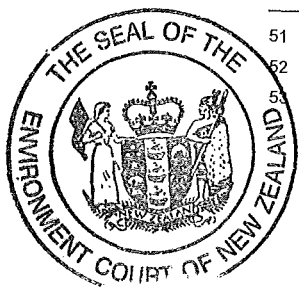
[125] Dr Ausseil referred to a recent report on the broad scale mapping of the Manawatu Estuary which was included as Appendix A of Mr Brown's evidence. He considered that the report is particularly relevant in that it is the first assessment of the ecological state of the Manawatu Estuary since a 1992 study. He recorded the key conclusions of this report as:

- (a) The Manawatu Estuary is currently in "moderate" ecological health overall;
- (b) Indicators of eutrophication risk (macroalgal growth and gross eutrophic condition) were rated "very low". In other words, the effects of nutrients in the estuary are currently low;
- (c) There is a high risk of adverse impacts to the estuary ecology due to excessive muddiness⁵³.

Cultural history of the site and environs

[126] It is evident that there is a long cultural history associated with the site and its environs. It is also clear that the Manawatu River and its tributaries are significant to all iwi and hapu in the vicinity of the site.

[127] A number of sites of cultural significance are present in the general area in which land application is proposed. These are described in the cultural impact assessments and in a number of briefs of evidence and a number are shown on drawings presented through the hearing. While we do not attempt to reproduce a



⁵¹

EIC at para 25(c).

⁵²

EIC at paras 23 and 24.

⁵³

Rebuttal evidence, paragraphs 7 and 8.

complete list of sites, they include a church, a meeting house and marae, two urupa, some unmarked burial grounds and kainga.

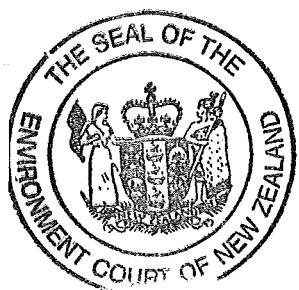
[128] We understand that the southern-most urupa has been progressively and now substantially or totally eroded by the Whirokino cut. We understand that the meeting house was destroyed by fire in or just before 1948⁵⁴ and that the church blew down in a storm in 1969⁵⁵.

[129] Three iwi joined these proceedings as s 274 parties and all prepared evidence about their associations with Matarakapa. These were Rangitaane o Manawatu (RoM), Te Roopu Taiao o Ngati Whakatere (Ngati Whakatere) and Te Taiao O Ngati Raukawa (Ngati Raukawa). As noted earlier, as a result of agreements reached with the Applicant, Ngati Whakatere and Ngati Raukawa subsequently withdrew from proceedings.

[130] RoM remained a party and Mr P Horton, on behalf of Tanenuiarangi Manawatu Incorporated (TMI) made submissions and presented evidence. At the hearing he indicated there were still matters outstanding between RoM and the Council. In a memorandum of counsel for the Applicant dated 20 April 2018, counsel advised that:

The Applicant and Rangitaane have reached an agreement which resolves Rangitaane's concerns with the proposed conditions, in particular those related to the Cultural Health Index Monitoring process. This agreement does not require any changes to the conditions as proposed during the resumed hearing in December 2017

[131] Based on the above, we understand there to be no outstanding issues relating to cultural concerns arising from the proposal except to the extent that aspects of the agreements reached between the Applicant and iwi are to be reflected in conditions to be approved by the Court if consent is granted.



⁵⁴ Kahotea EIC at para 1.17 (n).

⁵⁵ Roopu Taiao o Ngāti Whakatere Cultural Impact Assessment, page 38.

Foxton wastewater treatment plant

Plant description

[132] The treatment plant comprises a single 4.6 ha facultative pond constructed in 1974 and two 0.8 ha maturation ponds constructed in 1997⁵⁶. It serves a population of about 2643 with around 23% of the wastewater flow coming from trade waste sources. Based on generally accepted primary pond design criteria in New Zealand, the pond system has the capacity to treat wastewater from double the existing population⁵⁷.

[133] After 40 years of operation, the facultative pond has accumulated a significant sludge layer. The Applicant intends to remove excess sludge from the facultative pond and the first maturation pond in the 2017/18 financial year as part of a separate process⁵⁸. A condition requiring removal of the sludge to occur is required.

Existing treatment plant performance

[134] Expert evidence in relation to wastewater treatment was provided by Mr R A Docherty and Mr D E Railton and is also addressed in the Wastewater Treatment Plant JWS. We note there was full agreement between the experts at conferencing, with one exception that "is likely to be relatively insignificant".

[135] Based on the evidence and supporting documents, we are satisfied that the FWTP is performing well in terms of normally expected results for oxidation pond systems in New Zealand.

Losses of nitrogen in partially treated wastewater from the floor and walls of the oxidation ponds

[136] We address this later in our decision.

Treatment plant odours

[137] Expert evidence in relation to air quality was provided by Mr R S Cudmore and Mr A Curtis. The air quality experts agreed that as long as there are sufficient levels of aeration in the FWTP there should not be any odour problems in the future and we accept that evidence.



⁵⁶ Railton EIC at para 18.
⁵⁷ Saily EIC at paras 39 and 40.
 Railton EIC at para 21.

[138] We note that the submission from Mr E W Zandbergen (Submission 12) opposed the discharge to air on the grounds that he has experienced odour from the treatment plant drifting over his property in Stewart Street and in Stewart Street itself in the past. He provided no details as to when the problems occurred or whether he had reported them to the Council. From the evidence and our questioning of witnesses during the hearing we found no evidence of past non-compliance with treated wastewater quality limits or any history of odour complaints⁵⁹.

Management of wastewater flows

[139] The assessment of effects on the environment for the project says "The average wastewater flow rate through the FWWTP is approximately 1,300 m³/d and increases from summer flows of about 1,100 m³/d to winter flows of about 1,550 m³/d"⁶⁰ The average flow is projected to increase to around 1650 m³/d by 2045⁶¹.

[140] It was clear from the evidence which we heard that the process to obtain the best available flow data was somewhat difficult. It would not assist our decision to record the details here but we consider that the Applicant took reasonable steps to establish a reliable flow record including asking the Regional Council for its records.

[141] We have reviewed additional information provided by the Applicant in response to the new data and concerns raised by the Regional Council and comment as follows:

- (a) A compliance assessment undertaken by Mr P J Lake⁶² (based on updated information provided by the Regional Council) showed inflows in excess of 2,000 m³/d occurred on 75 occasions between 15 February 2010 and 13 May 2015 and a further 147 occasions between 14 May 2015 and 30 November 2016. These numbers are substantially greater than those predicted from the original data set, although that data set did indicate that some exceedances had occurred.
- (b) Weather conditions during 2015 and 2016 were unusually wet but still within the historical range and the scale of infiltration of groundwater

⁵⁹ Section 42A Report by Gregory Robert Bevin.

⁶⁰ Foxton Wastewater Discharge, Resource Consent Application and AEE dated October 2015, section 5.9.

⁶¹ Foxton Wastewater Treatment Plant Design Review and Upgrade Options (HDC, 2015:C8), Executive Summary.

⁶² Memorandum dated 7 March 2017 from Mr Lake to Mr Lowe, included as Appendix C to Mr Lowe's rebuttal evidence dated 21 March 2017.



inflow does not appear to have changed. However, it did appear that trade waste flows had increased by about 200m³/d during 2016.

- (c) The Applicant has had an infiltration and inflow (I/I) investigation and management programme underway for a number of years and anticipates this continuing for a further three years⁶³.

[142] The evidence and supporting documentation on inflows and outflows to and from the treatment plant was unclear. A review of the outflow data undertaken by Mr Lake showed the data and the flow meter generating them to be reliable and that the inflow data seemed to be generally in line with the outflow data⁶⁴. For the purposes of our decision, we relied on the following evidence:

- (a) It seems that future storm events and wetter than usual months, combined with the modest increases in trade waste flows, will generate flows exceeding 2,000m³/d more frequently than during previous years⁶⁵.
- (b) Agreed seepage losses of around 185 m³/d will reduce the outflow volume⁶⁶.
- (c) The experts have agreed that controls on the treated wastewater discharge can be implemented to maintain discharge volumes at no more than 2,000m³/d⁶⁷, which is the maximum daily discharge allowed under the consent.

[143] Based on that evidence we are satisfied that the 2,000m³/d limit can be met for the three-year period applied for, with appropriate conditions.

[144] To ensure effective controls are in place, conditions in relation to infiltration and inflow and trade waste are to be included in the consent. We consider these are relevant to the long-term discharge to land as well as the consent to discharge to the Foxton Loop.

[145] The conditions for irrigation to land as agreed between the Applicant and the Regional Council place no limit on the volume of treated wastewater that can be discharged. We consider that control of flow is necessary for effective management

⁶³ Mr Saidy in response to questions from the Court, NOE at page 42.

⁶⁴ Memorandum dated 7 March 2017 from Mr Lake to Mr Lowe, included as Appendix C to Mr Lowe's rebuttal evidence dated 21 March 2017.

⁶⁵ Memorandum dated 7 March 2017 from Mr Lake to Mr Lowe, included as Appendix C to Mr Lowe's rebuttal evidence dated 21 March 2017.

⁶⁶ Groundwater JWS, page 3.

⁶⁷ Wastewater treatment plant JWS, item 10.



of the irrigation system. A condition to that effect should be included in the consent. We consider that the same discharge flow should apply recognising that approximately 10% of the incoming flow will be lost by way of seepage from the ponds, effectively providing for an equivalent level of increase in the incoming wastewater flow volumes.

Provision of future storage

[146] The expert witnesses agreed that a pond storage volume of 50,000m³ should be provided⁶⁸. Dr Horne considered that with the revised irrigation system described below, this volume of storage would only just be adequate to accommodate the increased flows recorded during 2015 and 2016⁶⁹. We consider this can be addressed by the consent condition proposed that requires a five-yearly review of storage performance.

[147] The Applicant proposes to provide the above 50,000 m³ of additional treated wastewater storage partly in a new lined pond with a minimum volume of 20,000 m³ and the rest in the existing oxidation ponds⁷⁰. The Applicant advised that both sets of works can be accommodated within the existing site designation. If this is found not to be the case for any reason an application to alter the designation or new resource consent applications will be required.

The proposed irrigation system

[148] Mr Lowe testified that the aim of the land treatment system “is to beneficially use the applied wastewater for productive use, while using the environment to provide further treatment of the wastewater”.⁷¹

[149] The irrigation system proposed for Matarakapa was modified during the application process in response to issues raised in submissions and during expert conferencing. The final system concept was agreed following expert conferencing between Mr Lowe and Ms K J Beecroft for the Applicant and Dr Horne for the Regional Council⁷². The most up-to-date “indicative design concept” is shown in Annexure 2, which is reproduced from Figure EC2, which was included as Appendix D3 of Mr Lowe’s statement of further supplementary evidence dated 20 June 2017.

⁶⁸

Irrigation and Soil JWS, page 6.

⁶⁹

Lowé Rebuttal evidence dated 21 March 2017 at para 34.

⁷⁰

Lowé Evidence dated 8 December 2017 at para 61.

⁷¹

EIC at para 70.

⁷²

Court Exhibit 3, Paragraph/Issue 7.



Inferred groundwater flow directions agreed by the groundwater experts are shown on the same figure.

[150] The total farm area available is divided into three LMUs as shown on Figure EC2, namely:

- LMU 1 low lying, medium to poorly draining silty soils that are susceptible to surface flooding and silt deposition from time to time;
- LMU 2 elevated sandy plains and rolling dunes consisting of well drained sandy soils and elevated above all flood hazards; and
- LMU 3 elevated steep sandy dunes and inter-dune basins⁷³.

[151] Within each LMU areas suitable for irrigation were identified and described as irrigation management units (IMU). Essentially, it is proposed to use deficit irrigation in LMU 1 and non-deficit irrigation in LMU 2 and LMU 3.

[152] At a witness conference on 28 March 2017, Mr Lowe and Dr Horne agreed proposed nitrogen loading rates and consent limits for irrigated and non-irrigated areas of each LMU, in kgN/h/y, based on Overseer Version 6.2.3, which are reproduced in Table 1. The figures in bold represent the experts' recommendations on maximum allowable nitrogen application rates which are intended to apply as discussed in paragraphs [156] and [157]⁷⁴.

[153] As noted earlier, the proposed consent limits raise a *vires* issue in that they exceed the loads referred to in the application and an evaluation issue in that they are applied loads not losses below the root zone, which is the basis of the One Plan provisions.

[154] As indicated earlier, all references to predicted nitrogen losses and effects on the environment in the remainder of our decision are based on the most up-to-date predictions using Overseer Version 6.2.3 unless stated otherwise. This is to ensure we assess effects to take account of the highest predicted nitrogen losses, which in turn allows consideration of the greatest potential effects.

⁷³ Lowe EIC at para 81.
⁷⁴ Court Exhibit 3, Paragraph/Issue 11.

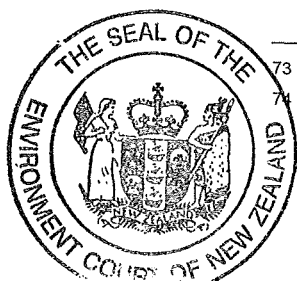


Table 1
Overview of irrigation proposals based on Overseer Version 6.2.3

Nitrogen source		Land area (ha)*	Proposed loading			Proposed consent limit
			Irrigation	Fertiliser	Total	
LMU 1	Irrigated (IMU 1)	18	82	76	158	200
	Non-irrigated	15	0	76	76	100
LMU 2	Irrigated (IMU 2)	37	193	0	193	200 (300) (400)
	Non-irrigated	4	0	76	76	200
LMU 3	Irrigated (IMU 3)	8	250	0	250	250 (300) (400)
	Non-irrigated	4	0	0	0	50

* Reproduced from Court Exhibit 3, paragraph/issue 11 on the second page

[155] The revised land irrigation system (to take account of suggested improvements made by Dr Horne) was described in the rebuttal evidence of Mr Lowe (paragraphs 23 to 32). Mr Lowe described three key changes as set out in the Irrigation and Soil JWS as follows:

- (a) A slight increase in land areas in IMU 2 and IMU 3;
- (b) Slightly more storage;
- (c) Use of IMU 3 for agronomic purposes, with infrequent use beyond agronomic rates when storage is exceeded.

[156] The agreed application rates are less than 15 mm/application in IMU 1, and less than 20 mm in IMU 2 and IMU 3. The limit on nitrogen applied to IMU 2 can increase to 300 kg/ha/y or greater if crops are harvested.

[157] The limit on nitrogen applied to IMU 3 can increase to up to 400 kg/h/y in the event of exceptional circumstances which are deemed to occur when the treated wastewater storage is full. We note that Dr Horne's modelling proposed that



application rate should not exceed 500 kg/ha/y, which suggests the proposed consent limit could be exceeded.

[158] We also note that Dr Horne considered there would be no benefit in limiting application of treated wastewater to IMU 3 to when the flow in the Manawatu River was above the 20th FEP. We accept his evidence in that regard.

[159] Mr Lowe considered that the review of the irrigation regime by Dr Horne was robust⁷⁵ and again we agree. We found Dr Horne's responses to questions under cross examination and from the Court to be highly credible and particularly helpful in explaining the complex irrigation issues involved in this case. Consequently, we found no reason to change any aspects of the proposals as suggested by WPS. The key issues of concern to us are the quantity of nitrogen leaving the site below the root zone and any attenuation that occurs before it reaches surface water, as these are what ultimately determine the effects of nitrogen on the environment, not the quantity applied to the land *per se*.



Lowé Rebuttal Evidence dated 21 March 2017 at para 24.

Part D

Key factors taken into account by the Court when assessing the proposal

Adequacy of consideration of alternatives

[160] The consideration of alternatives provides a key input to the process to determine the BPO for the project. We consider that the BPO needs to be determined on a whole of project basis, not just by selecting the best sites for the treatment plant and land application area which appeared to be the over-riding approach taken by the Applicant. In this particular case where nitrogen losses to water are critical considerations in determining the outcome, the assessment of the BPO must include detailed consideration of other components that could reduce such losses, including lining the oxidation ponds and improving nitrogen removal efficiencies within the FWTP. We consider each element in turn below.

Alternatives sites considered for treatment and land application of treated wastewater

[161] The process used to consider alternatives was comprehensively described in the evidence of Messrs Saily and Lowe⁷⁶ and in various reports provided to the Court. We see no benefit in repeating large parts of the evidence in our decision and simply record that the work undertaken was extensive, followed a logical process starting at a district level before focusing on a wide range of local alternative sites and provided good opportunities for interested or affected parties to participate in the process.

[162] From the 20 or so sites considered, four preferred sites emerged for additional investigation as part of the Foxton Focus Group process. These were:

- (a) Waitarere Forest;
- (b) Darleydale property (Motuiti Road general area);
- (c) Matarapa; and
- (d) Target Reserve⁷⁷.

[163] A Best Practicable Options Report was prepared which considered each of the four shortlisted sites in terms of location, potential design, environmental acceptability

⁷⁶

Principal environmental scientist at Lowe Environmental Impact and principal technical advisor to the Applicant.

⁷⁷

Saily EIC at para 149.



and RMA requirements, social and recreational acceptability, cultural acceptability, access to land and legal issues and affordability⁷⁸.

[164] We have reviewed the process followed by the Applicant and the various reports, which we record amounted to almost 20 separate reports. We are satisfied that the process was robust and transparent and that there is no evidence that the Council had predetermined the outcome at any stage as was inferred by some s 274 parties. We are also satisfied that the Applicant provided good opportunities for parties to contribute to the process, took into account the views of different parties through the process and investigated a number of additional sites suggested by different parties. We are satisfied that these investigations considered an appropriate range of factors and were completed to an appropriate level of detail.

[165] As in the case of its approach to consultation, the Applicant is to be complimented on the open, comprehensive and well documented process used to investigate alternative sites. Although we do not see there can be any valid justification for challenging the adequacy of the process, that does not obviate the need for the proposed scheme to still pass the relevant tests under the Act including a requirement to adopt the BPO in a wider sense than just the best site.

[166] When reviewing the various documents, we noted the following costs were estimated for the four shortlisted options considered⁷⁹:

- (a) Waitarere Forest – Greater than \$10 million capital costs, moderate to high operating costs and would add at least \$80 per property to annual rates. Access arrangements and lease or purchase of land not included;
- (b) Darleydale property (Motuiti Road general area) - Greater than \$14 million capital costs, moderate to high operating costs, would add at least \$112 to annual rates and if land could not be leased, land purchase cost could be \$3-4 million.
- (c) Matararapa Island - Estimated \$7.5 million capital costs, low to moderate operating costs, would add approximately \$60 to annual rates and access arrangements and lease or purchase of land not included above.

⁷⁸

Saidy EIC Table 6

⁷⁹

Foxton Wastewater Discharge - Determination of the Best Practicable Discharge Site, Table 6.



- (d) Target Reserve - Estimated \$13.5 million capital costs, high to very high operating costs, would add approximately \$108 to annual rates and costs of changing reserve status and leases not included above

Treatment plant upgrading options considered

[167] Although we have acknowledged the comprehensive nature of the site selection process, we found no significant reference to what treatment plant upgrading options might have been considered in the evidence of either the Applicant or the consent authorities. We anticipate this was because, until recently, they may not have fully appreciated the implications for the proposal of constraints on discharge nitrogen loads from intensive farming operations imposed by the One Plan.

[168] To assist our understanding of what information was available about treatment plant upgrading options identified and/or considered, we reviewed the Applicant's report entitled "Foxton Wastewater Treatment Plant Design Review and Upgrade Options (HDC, 2015:C8)", dated July 2015. The report identified a number of possible upgrading options but provided no assessment of the nitrogen removal performance of treatment plant alternatives considered as part of an assessment of the overall BPO for the project. The report concluded:

A number of WWTP upgrade options are available for consideration should the need arise in future, but the current treatment performance provides no incentive or urgency for further investigating the potential design or implementation of any upgrade options.

[169] In our view consideration must be given to possible treatment plant upgrading to reduce nitrogen as part of determining the overall BPO for the project. In our initial response to the intensive farming memorandum in our thirty first case management minute, we advised that we wished to understand what potential there was to reduce nitrogen loads discharged from the irrigated area. We directed that additional evidence was to be presented on all reasonably practicable options, including improvements to the treatment plant.

[170] Mr Lowe presented the additional evidence (dated 8 December 2017), providing a preliminary indication of the reductions in nitrogen discharge losses that would occur below the root zone if the currently proposed nitrogen load in treated wastewater was reduced by 50%. We reproduce in Table 2 below the predicted reductions (based on Overseer Version 6.2.3 to provide the most conservative (high)



assessment) for each LMU and the whole farm. We also compare them to current predictions as set out in the most up-to-date earlier evidence provided by Mr Lowe⁸⁰.

Table 2
Predicted reduction in nitrogen losses below the root zone in treatment plant load were reduced by 50%

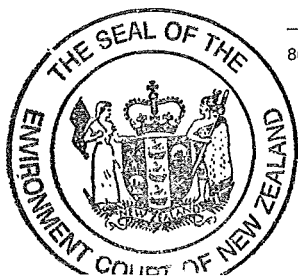
Portion of farm		Predicted nitrogen losses below the root zone in kg/h/y based on Overseer Version 6.2.3		
		At currently proposed pond nitrogen discharge load	With 50% reduction in pond nitrogen discharge load	Reduction
LMU 1	Irrigated	22	20	2
	Non-irrigated	12	11	1
LMU 2	Irrigated	69	45	24
	Non-irrigated	11	11	0
LMU 3	Irrigated	140	63	77
	Non-irrigated	8	8	0
Whole of farm averages		34	23	11

[171] In the same evidence, Mr Lowe advised it would be challenging for any additional treatment systems to consistently achieve a 50% reduction in final effluent nitrogen loads, compared to current levels. He also provided a range of cost estimates for different mitigation options, which we consider later in our decision.

The alternative of lining the oxidation ponds to minimise overall nitrogen losses

[172] Rule 14-16 of the One Plan provides for the discharge onto or into land of human effluent for the purpose of storing or treating the effluent in ponds as a permitted activity. We understand that the FWTP meets the relevant conditions/standards/terms, except for (a), which is that “All effluent storage and treatment facilities (including sumps and ponds) must be sealed to restrict seepage of effluent. The permeability of the sealing layer must not exceed 1x10⁻⁹ m/s.”

⁸⁰ Table 1 of updated Court Exhibit 3 included as Appendix D8 in Statement of supplementary evidence dated 20 June 2017.



[173] The application documents state that under Regional Plan Rule 14-30, a discretionary consent is required to discharge treated wastewater from human effluent storage and treatment facilities to land which may enter water via the floor and walls of the storage ponds⁸¹.

[174] The ponds currently treat an average wastewater flow of 1287 m³/d⁸². In the order of 156 m³/d of seepage is estimated to be occurring from the existing oxidation pond system. If the pond operating level is increased to provide additional storage an increase in seepage of 29 m³/d is predicted to result, with the estimated future discharge being 185 m³/d.⁸³ Mr T Baker agreed with this calculation⁸⁴.

[175] It is difficult to predict nitrogen losses in pond seepage accurately. Mr S J Douglass⁸⁵ estimated that the total mass of nitrogen discharged will increase from a current 2,335 kgN/y to 2,769 kgN/y, an increase of 434 kgN/y⁸⁶. These estimates were not challenged and we adopted them. We note that these figures make no allowance for nitrogen attenuation in the soil and/or groundwater/soil pathways at the site.

[176] For completeness, we note that Mr Baker⁸⁷ and Mr Douglass agreed that the effects of the additional seepage on groundwater quality would be no more than minor⁸⁸.

[177] Lining the ponds would reduce nitrogen loads to the Loop in the future. Without lining the future unattenuated load of 2,769 kg N/y would be in addition to the unattenuated 4,907 kg N/y leached from the intensive farming operation, representing an increase of more than 50% in the total load discharged into the wider aquatic environment.

[178] Mr Lowe advised that he took a precautionary approach when designing the irrigation system and assessing its effects and assumed that all wastewater flows would be irrigated as if the ponds were sealed. This means that while his

⁸¹ Resource consent application and AEE Table 2.1.

⁸² Railton EIC at para 19.

⁸³ Railton EIC at para 38.

⁸⁴ EIC at para 57.

⁸⁵ Mr Douglass is a principal hydrogeologist at GHD Limited, engaged by the Applicant. EIC at para 70.

⁸⁷ Mr Baker is an Associate Hydrogeologist at Jacobs New Zealand Limited engaged by the Regional Council. Douglass Rebuttal Evidence at para 8.



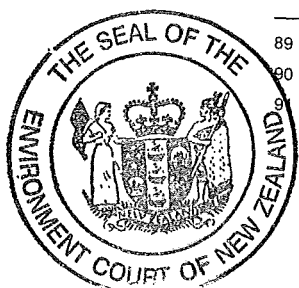
assessments include an element of double counting of the seepage losses to both the ground under the ponds and equivalent treated wastewater flows to the irrigation area, the 4,907 kgN/y irrigation losses would not increase if the ponds were sealed.

[179] We questioned Mr Lowe on how much the 4,907 kgN/y irrigation losses would reduce if he had assumed the ponds would not be lined. In his final statement of evidence entitled "Response to Commissioner Hodges' Questions", dated 19 December 2017, he stated that the actual reduction in applied load would be 23%, which he calculated by subtracting the loss from the ponds (2,500 kgN/y approximately) from the total load of 11,000 kgN/y applied to the irrigation area. He went on to say this resulted in an 18% reduction in irrigation drainage from 34 to 28 kgN/h/y.

[180] We had some difficulty in understanding the reasoning for this assessment. When we multiplied the increased discharge volume of 185 m³/d (the estimated pond seepage losses) of treated wastewater by a total nitrogen concentration of 22 g/m³ from Table 4.8 of the Design Review and Upgrade Options Report (2015:C8), the applied load would reduce by 1,500 kgN/y not 2,500 kgN/y, or an equivalent reduction in nitrogen loss from the irrigated area of around 10%. We consider this to be a more rational approach, and have worked on the lower figure. However, while it is relevant for the purpose of comparison with Table 14.2 values, it is not material to our overall decision based on our assessment of effects on the environment.

[181] Messrs Brown, Docherty and St Clair each raised the issue of pond leakage in their s 87F reports⁸⁹. When referring to pond leakage in his EIC Mr Brown stated "the nutrients add cumulatively to an already stressed system, such that the effects of the activities must be managed so as to minimise effects."⁹⁰ Mr Baker expressed his preference that the ponds be lined as this would result in further tangible reductions in nutrient loading on the Loop⁹¹.

[182] Mr Lowe recorded that it is best practice for all new wastewater ponds to be lined but that lining older ponds can be problematic. In his rebuttal evidence, he stated "I understand that it is physically very difficult to install a liner across the base of a single 4.8 ha pond, even when undertaking de-sludging." He referred to



⁸⁹ Lowe EIC at para 115.
⁹⁰ EIC at para 34.
⁹¹ EIC at para 71.

“significant logistical complications”, a need for alternative treatment facilities if the pond were to be emptied and that it could be “cheaper and more practicable to abandon the existing unlined pond and instead construct an entirely new lined pond.”⁹²

[183] Mr Saidy stated that “the existing ponds will not be lined. Lining the existing ponds would cost in excess of \$2 million and create operational issues of having to manage the continual inflow.”⁹³

[184] We are satisfied that the Applicant did consider the alternative of lining the ponds adequately although not in the context of the Table 14.2 constraints on nitrogen discharges that are now acknowledged by the different parties and must be considered by the Court. We return to this later in our decision.

Making appropriate allowances for uncertainties

[185] There are a number of aspects of the applications before the Court which involve significant uncertainties and which had the potential to materially affect our decision. We describe these below, and how we have dealt with them.

Reliability of nitrogen loss predictions

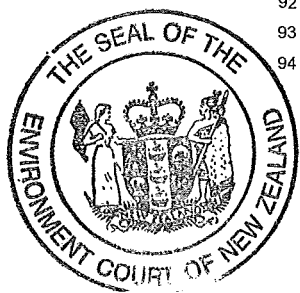
[186] The prediction of nitrogen losses from the intensive farming activity, including the irrigation of treated wastewater, was undertaken using Overseer. Like all computer models, Overseer involves a level of uncertainty. For clarity, “uncertainty” in the context of a model such as Overseer can be defined as a potential limitation in some part of the modelling process that is a result of incomplete knowledge⁹⁴.

[187] This issue has been the subject of much debate over a number of years. The Court has studied the debate closely. While taking a neutral position in the debate we must consider the potential consequences for our decision if there are variations in the predictions, particularly if they were to increase. We explored this issue in some detail by way of a minute dated 4 May 2017 requesting further information and through questioning of Mr Lowe and Dr Horne.

⁹² Rebuttal evidence dated 21 March 2017 at paras 77 and 78.

⁹³ EIC at para 205.

⁹⁴ Evidence of David Mark Wheeler, scientist with AgResearch Limited as lead developer of Overseer nutrient budgets. Evidence to Tukituki Board of Enquiry, paragraph 6.1.



[188] Mr Lowe was of the opinion that it is reasonable to assume that the precision of the model is less than plus or minus 20%. While we are aware that somewhat higher variations have been mooted in other situations, we accept Mr Lowe's opinion as appropriate for the particular circumstances applying in this case. For the avoidance of doubt, this should not be seen as an allowance that the Court considers should be applied universally – it needs to be considered on a case by case basis.

What attenuation of nitrogen in soils and the groundwater systems can be relied upon?

[189] The original application used attenuation factors of 50% for the farm discharges and 75% for pond seepage⁹⁵.

[190] There is little, if any, site or locality specific information to provide guidance on this question except that Mr Douglass stated that based on existing monitoring data, a conservative estimate would be to apply an attenuation factor of 0.6 to 0.7 to the overall mass of nitrogen lost from the ponds⁹⁶. At paragraph 86 of his EIC Mr Douglass considered a 30 to 50 % reduction in nitrogen concentrations would be conservative and considered the effects of both as well as the consequence of there being no attenuation.

[191] On page 4 of the groundwater JWS it is recorded that the experts agreed that it would be appropriate to apply a 30% attenuation factor, which is significantly less than assumed at the time of the applications. As a consequence, the quantity of nitrogen discharged to surface water increased significantly compared to that considered in the AEE.

[192] We were still concerned there was an element of uncertainty around the 30% figure because of the largely sandy nature of the soils in the LMU 2 and 3 areas and requested further information from the Applicant. Mr Douglass provided a helpful response in his memorandum dated 8 May 2017 to Mr Lowe (included as Appendix G of Mr Lowe's further supplementary evidence dated 20 June 2017). Mr Douglass acknowledged that the apportioning of an attenuation factor as it relates to mass removal via the process of denitrification is a challenging question to resolve.



⁹⁵ Lowe Further supplementary evidence dated 20 June 2017 at para 108.
⁹⁶ EIC at para 72.

[193] Based on the memorandum and other evidence we are satisfied that 30 % attenuation is appropriate for assessing effects on the Loop but that, in view of the different nature of the local soils compared to the sandy soils in the LMU 2 and 3 areas, it is likely to be somewhat higher in practice.

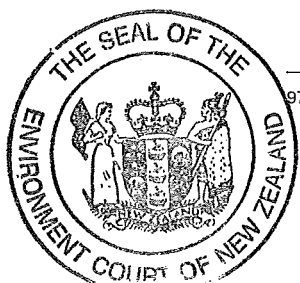
[194] Mr Douglass' memorandum noted that beneath the dunes where high rate irrigation is proposed to occur, there is no specific information to suggest that denitrification conditions will persist in the discharge pathway towards the Manawatu River. It also noted that "This area remains more likely to exhibit little change in nitrogen mass once leached from the soils." He indicated that attenuation could be between 0 and 30%. In response to our questions of Dr Horne relating to our concerns about how much attenuation would be likely in the IMU 3 area, he considered we were correct to be concerned⁹⁷.

[195] We record that the above information confirms a possibility we had thought might be the case. While Mr Douglass fairly acknowledges that the attenuation factor could be zero, we consider this is unlikely and for our purposes we have adopted a mid-point value of 15% as our basis of assessing effects on the River.

Position of the groundwater divide through the irrigated area

[196] This was initially the subject of disagreement between groundwater experts and influences the proportion of nitrogen leaching into the groundwater system that will reach the eastern and western arms of the Loop respectively.

[197] The experts have now agreed a position for the divide based on their interpretation of the available groundwater data (as shown on attached Figure EC2), and this was used by the relevant experts to calculate future nitrogen loads to the two arms of the Loop. While it is likely that the future position of the divide could change and vary over time for a number of reasons, including seasonal variations, we do not consider that any changes in the distribution in loads to the two arms of the Loop will be of sufficient magnitude to materially affect our decision, particularly in view of the other uncertainties that exist. Accordingly, we have made no specific allowance for this uncertainty in our assessment of effects but include it within an overall sensitivity analysis.



Uncertainty around the existing nutrient environment in the Loop

[198] To enable the benefits of the project to the Loop to be determined, we would normally expect to start with an understanding of the existing Loop environment and the contribution that the existing direct discharge of treated wastewater to the Loop is making. That is not possible for a number of reasons.

[199] Mr Brown gave evidence that “There is very little available information to assess the effects of the current discharge on the Foxton Loop⁹⁸.” Dr Ausseil gave evidence that “The complex tidal regime of the Foxton Loop makes it difficult to assess with certainty the effects of the current discharge on water quality and ecology of the Foxton Loop⁹⁹.”

[200] By way of further explanation, we note that for the majority of the period of each incoming tide, nitrogen in the continuous discharge of treated wastewater into the western arm of the Loop will be pushed back up the Loop towards and in part into the eastern and more sensitive arm. This complicates even the normally relatively straight forward task of comparing loads into the eastern arm before and after any change in discharge regime.

[201] Both experts agreed that the current discharge regime is likely to be having a significant adverse effect on the Loop. They also both agreed that the presence of large beds of the invasive aquatic macrophyte hornwort that assimilate nutrients likely result in low levels of SIN being measured, which are below the relevant One Plan water quality targets.

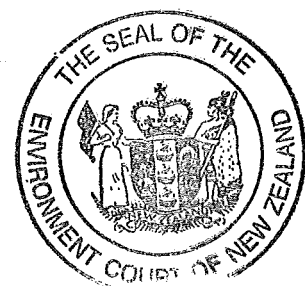
[202] Put simply, there is no scientific basis available to us to assess the existing effects of the discharge on the Loop nor any improvements that might be expected when the discharge is removed. Accordingly the only option available to address this aspect of the applications is a common-sense assessment based on the extent of nutrient removal that can be expected.

Taking a sensitivity analysis approach

[203] In view of the many uncertainties we considered it prudent to adopt a sensitivity analysis approach to understanding risk. This requires us to adopt the most up-to-date information provided to us by the experts and assess the effects on the

⁹⁸ EIC at para 16.

⁹⁹ EIC at para 5.



environment, assuming that in a worst-case situation there could be an overall increase in the predicted total nitrogen load discharged to the particular receiving environment. In the case of discharges to the Manawatu River we used a 30% increase which we consider would adequately provide for any reasonable combination of uncertainties, including attenuation factors being less than the 30% assumed and nitrogen loads being higher than those predicted using Overseer version 6.2.3. We did not consider any allowance needed to be added for discharges to the Loop as any variations in Overseer predictions are likely to be adequately compensated for by the attenuation factor being higher than the 30% assumed because of the nature of the soils in that part of the site.

Relevant One Plan values and targets to be used as the basis of assessing effects on the surface water environment

[204] In essence, Objective 5-2 in Chapter 5 of the Regional Policy Statement requires that water quality is managed so that it is maintained where it is at a level sufficient to support the Values in Schedule B of the District Plan and enhanced where it is not.

[205] The relevant values are set out in Mr Brown's s 87F report where he stated (explanations in italics in brackets were our addition based on One Plan explanations):

The following values have been identified in the Manawatū Loop in the vicinity of the proposed discharge point (refer Map 3 and 4 for reach specific values):

- (a) Life Supporting Capacity –Lowland mixed (LM) geology; (*which requires the water body and its bed to be able to support healthy aquatic life and ecosystems*)
- (b) Amenity (approximately 2.5km upstream of the discharge point) (*which must be maintained or enhanced*);
- (c) Site of significance –cultural (*which must be maintained or enhanced*);
- (d) Water supply (*which means water quality must be suitable for this use*);
- (e) Aesthetics (*which must be maintained or enhanced*);
- (f) Mauri (*which must be maintained or enhanced*);
- (g) Contact Recreation (*which must be maintained or enhanced*);
- (h) Stockwater (*which means water quality must be suitable for this use*);
- (i) Water Supply (*which means water quality must be suitable for this use*);
- (j) Industrial Abstraction (*which means water quality must be suitable for this use*);
- (k) Existing infrastructure (*which means the integrity of the infrastructure must not be compromised*);



- (l) Irrigation (*which means water quality must be suitable for this use*); and
- (m) Capacity to Assimilate Pollution (*which means the capacity must not be exceeded*).

[206] We referred to expert evidence and Table E.2 of the One Plan to obtain zone specific water quality targets applicable to the Manawatu River from downstream of Whirokino, as follows:

- (a) DRP less than 0.015 g/m³ annual average;
- (b) SIN less than 0.444 g/m³ annual average; and
- (c) Ammoniacal nitrogen less than 0.4 g/m³ average and maximum less than 2.1 g/m³. Dr Ausseil noted that the first value is the chronic value and the higher one is the acute value¹⁰⁰.

[207] We have used the above values and water quality targets when assessing effects on the surface water environment.



¹⁰⁰

EIC at para 48.

Part E
Assessment of Effects on the Environment

Preliminary comments

[208] We note that there was agreement amongst relevant experts that the proposed land-based discharge will have a significant positive benefit in terms of the reducing the quantities of contaminants entering surface water. However, as noted earlier, the AEE was largely out-of-date by the end of the hearing because of the many changes that had occurred since the original document was prepared. This required us to adopt a “first principles” approach to considering the effects of the proposal.

[209] There was also agreement among experts that nutrients were the key contaminants of concern. Dr Ausseil agreed with Mr Brown and Dr P A Gillespie¹⁰¹ that nitrogen is the primary nutrient of concern with regard to risks of eutrophication within the Lower Manawatu River including the Loop and the Manawatu Estuary¹⁰².

[210] Dr J Horswell¹⁰³ concluded that the effects of pathogen leaching will be negligible¹⁰⁴. Mr Lowe gave evidence that any biochemical oxygen demand (BOD) entering groundwater will be negligible¹⁰⁵.

[211] Mr Brown and Dr Ausseil agreed that the proposal will result in near complete elimination of effects on water clarity, colour, microbiological water quality (*E.coli*), particulate organic matter and soluble BOD¹⁰⁶.

[212] From our reviews of all the evidence, we conclude that there are no contaminants that need to be considered in terms of effects on the environment, other than nutrients.

¹⁰¹ Marine scientist in the Coastal and Freshwater Group at the Cawthron Institute, for the Applicant.

¹⁰² EIC at para 29(a).

¹⁰³ Science Leader at the Institute of Environmental Science and Research, for the Applicant.

¹⁰⁴ EIC at para 44.

¹⁰⁵ EIC at para 147(a).

¹⁰⁶ Water quality JWS, page 2.



Assessment of effects of contaminant discharges on groundwater

[213] We start by considering the relevant One Plan provisions commencing with Objective 5.2 (b) (Water quality) which is that:

Groundwater quality is managed to ensure that existing groundwater quality is maintained or where it is degraded/over allocated as a result of human activity, groundwater quality is enhanced.

[214] Policy 5-6 (Maintenance of groundwater quality) then relevantly provides that:

- (a) Discharges and land use activities must be managed in a manner which maintains the existing groundwater quality, or where groundwater quality is degraded/over allocated as a result of human activity, it is enhanced.
- (b) An exception may be made under (a) where a discharge onto or into land better meets the purpose of the RMA than a discharge to water, provided that the best practicable option is adopted for the treatment and discharge system.

[215] We are satisfied that that the discharge to land proposed by the Applicant better meets the purpose of the Act rather than a discharge to water. The discharge to land is mandated by One Plan to avoid discharge to water. As long as we are satisfied that the treatment and discharge system represents BPO (and we are) then the discharge to land is not required to maintain or enhance groundwater quality.

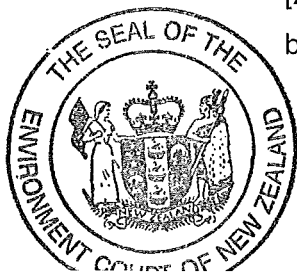
[216] We also refer to Policy 5-7 (Discharges and land use activities affecting water quality), which specifically refers to the management of land use activities in accordance with Policy 5-6. Policy 5-7 relevantly provides:

The management of land use activities affecting groundwater and surface water must give effect to the strategy for surface water quality set out in Policies 5-2, 5-3, 5-4 and 5-5, and the strategy for groundwater quality in Policy 5-6, by managing diffuse discharges of contaminants in the following manner:

- (c) actively managing the intensive farming land use activities identified in (b) including through regulation in the regional plan, in the manner specified in Policy 5-8

We consider that the reference to the strategy in Policy 5-7 implicitly acknowledges the exception contained in Policy 5-6(b).

[217] It is clear from the evidence that there will be adverse effects on groundwater below and in the immediate locality of the irrigation area as a result of the proposal.



Mr Lowe provided updated comparative predictions of average total nitrogen drainage concentrations below each LMU in Table 4 of his revised Court Exhibit 3. These were 4.8 g/m³ below the plant root zone in LMU 1, 7.4 g/m³ in LMU 2 and 11.7 g/m³ in LMU 3. Some earlier values predicted by Mr Douglass in Table 5 of his EIC were significantly different, being 6.0 g/m³ in LMU 1, 15.4 g/m³ in LMU 2 and 11.1 g/m³ in LMU 3. We have worked on the basis that Mr Lowe's values were predicted later and supersede those of Mr Douglass to reflect changes to the irrigation design but note that using Mr Douglass' values would not change our findings.

[218] Mr Lowe predicted that the average nitrogen concentration in groundwater would rise from 4.0 g/m³ under the present system to 5.3 g/m³ under the proposal, an increase of 1.3 g/m³.

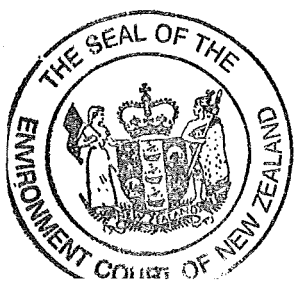
[219] Mr Baker referred to average nitrate concentrations in groundwater beneath the proposed LMUs which are affected by current farming practices, being in the range 6 to 8 mg/L and groundwater around the FWTP being affected by pond leakage based on a limited data set¹⁰⁷. Dr R Singh¹⁰⁸ calculated that, based on the Applicant's prediction of 7 kgN/ha/y, leaching nitrate concentrations from current bull beef operations would be 2.8 g/m³ and account for less than half the measured values in groundwater and that potential contributions from the FWTP should be considered.¹⁰⁹ Dr Singh's prediction appears significantly different to Mr Lowe's prediction of an increase in groundwater nitrogen concentrations of 1.3 g/m³ which is intended to reflect a predicted increase in leachate from 7 kgN/ha/y with current farming operations to 28 kgN/ha/y (revised down from 34 kgN/ha/y in Mr Lowe's evidence dated 19 December 2017) with the proposal.

[220] Mr Lowe also used a groundwater nitrogen concentration of 4.0 g/m³ as his starting point for considering increases resulting from the proposal whereas monitoring results indicate existing levels of 6 to 8 g/m³. We found this combination of evidence somewhat confusing. We understand there could be a number of reasons why monitored levels are higher than predicted levels and we explored this with Mr Lowe at the reconvened hearing.

¹⁰⁷ EIC at para 20.

¹⁰⁸ Senior Lecturer in Environmental Hydrology and Soil Science at Massey University, for WPS.

¹⁰⁹ EIC at paras 37 and 38.



[221] Ultimately, we were assisted in our decision by the evidence of Dr Horne and Mr Douglass. Dr Horne considered that a leaching loss of 34 kg/ha/y is typical of a partly irrigated farm on these soil types¹¹⁰. Mr Douglass considered the loss rates to be typical of most farming systems. He considered the effects on the groundwater system at Matararapa to be less than minor¹¹¹. Mr Baker also stated that because of the general groundwater flow direction, “the effects on other groundwater users would be less than minor¹¹².”

[222] Our overall findings are that nitrate levels in groundwater as result of the proposal will:

- (a) Be significantly elevated above natural levels;
- (b) Be elevated above existing levels by at least 1.3 g/m³ and potentially significantly more;
- (c) Be unlikely to differ materially from levels in groundwater elsewhere in the general locality affected by intensive farming activities;
- (d) Not adversely affect any existing users (as there are none) but could place some restrictions on future use of the local groundwater resource.

[223] As the proposal represents the BPO, we consider the above effects are acceptable and accord with the relevant Objective and Policies.

Summary of predicted nitrogen loads used as the basis for assessing effects on the surface water environment

[224] After many changes to predicted nitrogen loads, attenuation factors and flow directions throughout much of the hearing process, we now set out below the loads we have used as the basis for assessing effects on the environment. We have identified nitrogen loads from pond seepage and from existing and intensive farming separately but based our assessment of effects on the combined loads.

[225] Our assessments of total predicted nitrogen loads discharged to land or directly to surface water now (existing) and with the proposed project fully operational (future) are set out in the following Table 3.

¹¹⁰ EIC at para 45.
¹¹¹ EIC at paras 108 and 113.
¹¹² EIC at para 23.



Table 3
Total predicted nitrogen loads discharged to land or directly to surface water

	Existing kg N/y			Future kg N/y		
	From ponds to water directly or via seepage	From existing farm (No attenuation)	From existing farm after 30% attenuation	Direct to water	Onto land (No attenuation)	Load reaching water after 30% attenuation
From ponds	11,205 ¹¹³			0	2769 ¹¹⁴	1938
From farming		1525 ¹¹⁵	1067		4907 ¹¹⁶	3435
Total load to surface water			12, 272			5373

[226] We note that these are the same as the calculated values in Appendix A to Mr Lowe’s further supplementary evidence dated 20 June 2017. They indicate an overall reduction in nitrogen load discharged to the surface water environment from existing levels of approximately 56% as a result of the project. In Table 3 of Appendix G¹¹⁷ of the same evidence the existing quantity of nitrogen discharged to surface water was estimated separately by Mr Douglass as being 12,877 kgN/y or approximately 5% more. Given the uncertainties associated with the proposal, we consider this to an understandable and acceptable level of variation.

[227] To enable us to assess changes in discharges of nitrogen to different surface water receiving environments, we adopted the values set out in the updated version of Court Exhibit 3 (Appendix A as above) assuming the ponds remain unlined. While there were some differences between Mr Lowe’s values and those assessed by Mr

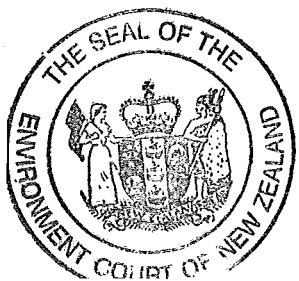
¹¹³ Direct discharge to western arm of Foxton Loop, Court Exhibit 3, Table 2

¹¹⁴ Pond seepage losses, Douglass EIC at para 70.

¹¹⁵ Current farm, Table 4 of Appendix A to Lowe Further supplementary evidence dated 20 June 2017 – revised upwards from 580.5 kg N/y in original version of the table provided by Mr Lowe at the March hearing.

¹¹⁶ Total losses from future intensive farming activity, including irrigated treated wastewater, Court Exhibit 3, Table 2.

¹¹⁷ Memorandum dated 8 May 2017 from Mr Douglass to Mr Lowe.



Douglass in Appendix G, these were not sufficient for us to be concerned. The changes are summarised in Table 4 together with revised values in the event that the ponds were lined, assuming 5% leakage from ponds as set out in the above Appendix G. There are minor differences between the equivalent totals in Tables 4 and 5 (no doubt due to different computational methods) but these are less than 0.5% and we consider them to be insignificant.



Table 4
Changes in predicted nitrogen losses to different surface water receiving environments

	Existing	Future prediction with no pond lining	% change from existing	Future prediction with pond lining	% change from existing
Southern Loop	253	538***	+113	538***	+113
Pond seepage to Eastern Loop	817*	969**		48	
Irrigation losses to Eastern Loop	337	664		664	
Total losses to Eastern Loop	1154	1633	+41	712	-38
Pond seepage to Western Loop	817*	969**		48	
Irrigation losses to Western Loop	150	759		759	
Direct discharge to Western Loop	9570 ¹¹⁸	0		0	
Total losses to Western Loop	10,537	1728	-83	807	-92
Manawatu River direct	309	1454***		1454***	
Manawatu River total discharges from Table 3	12,253	5353****	-56	3511*****	-71

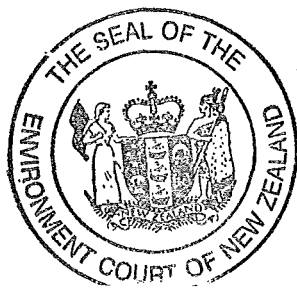
* Total losses of 2335, with 30% attenuation and 50% to Western Loop and 50% to Eastern Loop as paragraph 16 of Mr Douglass' rebuttal evidence

** Total losses of 2769, with 30% attenuation and 50% to Western Loop and 50% to Eastern Loop as paragraph 16 of Mr Douglass' rebuttal evidence

*** Assumes pond seepage does not flow to the receiving water

**** 2,769 from pond seepage, 4907 from irrigation, both with 30% attenuation

***** 5 % of 2,769 from pond seepage, 4907 from irrigation, both with 30% attenuation



¹¹⁸ Memorandum dated 8 May 2017 from Mr Douglass to Mr Lowe. Table 3.

Comparison of nitrogen reductions achieved by the proposal compared to average sub-catchment wide reductions required to meet the relevant One Plan soluble inorganic nitrogen water quality targets

[228] As a starting point for our assessments we considered the extent to which the proposal would contribute to meeting the average reduction in SIN required to meet the relevant One Plan water quality targets in different surface water receiving environments. Our findings are summarised in Table 5. We have included Mr Brown’s assessment of the reductions required based on full river flows in the first row for completeness but we note that the correct figures to be used (based on the One Plan) are those provided by Dr Ausseil in the second row based on the 20th FEP.

Table 5
Comparison of nitrogen reductions achieved by the proposal compared to the average reductions required to meet the sub-region wide One Plan SIN water quality targets

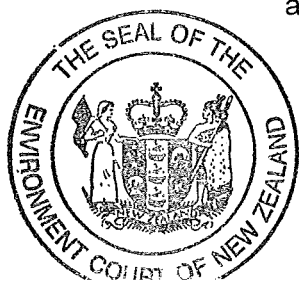
	Manawatu River	Manawatu Estuary	Western Arm of Foxton Loop	Eastern Arm of Foxton Loop
Percent reduction required to meet One Plan SIN target	16 to 33*	16 to 20*	No information	No information
Percent reduction required to meet One Plan SIN target	6**	No information	No information	No reduction required***
Percent reduction achieved by the project from Table 5	56 to 71	56 to 71	83 to 92	+41 to -38

* Dr Ausseil EIC, para 23, referred to paras 28 and 30 of Mr Brown's s 87F report

** Dr Ausseil EIC, para 23(c) referring to Report LEI, 2015:E2. Dr Ausseil noted that Mr Brown's results were for all river flows, while the LEI work was based on flows below the 20th FEP, which is the requirement in the One Plan

*** LEI, 2015:E2. Existing monitoring shows levels currently below One Plan target but likely to be influenced by uptake by Hornwort (Dr Ausseil, EIC, paragraph 26.

[229] The table shows that the nitrogen reductions achieved in the Manawatu River and Estuary are two to three times greater than the average reduction required across the sub-zone to meet the relevant One Plan targets.



Overview of effects of phosphorus discharges on surface water

[230] Mr Lowe testified that “The discharge from the FWTP contains P, but its application is unlikely to have an adverse effect on the soils of the site because soil transformation and plant uptake of the applied P is expected to remove the applied P¹¹⁹.” He further noted that the applied phosphorus in the treated wastewater is well within the capacity of the plants to utilise so the effects of phosphorus on the soil and plant system is expected to be negligible¹²⁰.

[231] Existing monitoring data relating to pond seepage indicates almost 100% reduction in dissolved reactive phosphorus (DRP) concentrations in monitoring wells¹²¹.

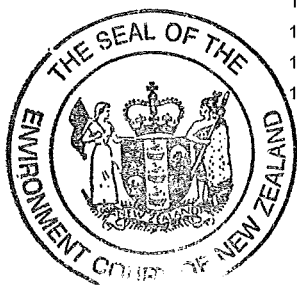
[232] Phosphorus does not readily move through groundwater at this site¹²².

[233] The overall phosphorus reductions required to meet the average sub-region wide One Plan water quality targets were assessed by the experts as follows:

- (a) Manawatu Estuary - 6 to 32 % based on all river flows 2013 -2015¹²³;
- (b) Manawatu River at Whirokino - Approximately 60% based on 20th FEP flows 2008 - 2013¹²⁴; and 0 to 12 based on all river flows 2013 -2015¹²⁵
- (c) Foxton Loop - Approximately 74% based on 20th FEP flows 2000 - 2008¹²⁶

[234] Dr Ausseil estimated that the reduction in phosphorus load to the Loop would be 92 to 98%, based on an existing load of 1833 to 1874 kg/y reducing to 32 to 151 kg/y, with the proposal in place. He estimated the overall reduction of phosphorus loads discharged to surface water as 86 to 97%, based on an existing load of 1839 to 1898 reducing to 59 to 258 kg/y with the proposal in place¹²⁷. There was no challenge to these estimates by any other expert. However, as a check, we issued a minute on 4 May 2017 asking if the changes in understanding of the groundwater system and proposed changes to the irrigation system and loads resulted in any significant changes to phosphorus load reduction predicted and if so, what are those

119 EIC at para 137.
 120 EIC at para 139.
 121 Douglass EIC at para 9.
 122 Douglass EIC at para 52(f).
 123 Brown s 87F report, paragraph 30.
 124 Ausseil EIC at para 23.
 125 Brown s 87F report, paragraph 30.
 126 Ausseil EIC at para 25.
 127 Ausseil EIC at paras 35 to 37.



changes? Mr Lowe responded to this by way of reply to a question from the Court at the reconvened hearing, confirming there were no changes of significance.

[235] Accordingly, we have accepted the evidence of Dr Ausseil in relation to phosphorus load reductions, which demonstrates that the percentage load reduction resulting from the proposal will significantly exceed the average percentage by which the load would have to be reduced across the sub-zone to meet the One Plan water quality target. Even if the highest actual load to the River was to be twice the estimate of highest value in the predicted range of 258 kg/y from paragraph [234], the reduction would still be more than required to meet a proportional share of the sub-zone-wide reduction. Similar conclusions can be reached for discharges to the Loop. In our view, this provides a very acceptable margin for safety and we accept that the proposal will meet and significantly exceed an equitable share of the region-wide phosphorus reduction required.

[236] We can see no valid basis to require a small contributor to produce greater reductions than the One Plan has determined to be the appropriate average for a zone as a whole unless this could be readily achieved at reasonable cost, which we do not consider to be the case.

[237] In our view, the reductions in phosphorus loads resulting from the proposal are substantial in terms of both total loads and percentages of the total load in the River. We acknowledge that even the very low loads that will result from the treatment plant discharges in the future will contribute to cumulative effects as identified by Mr Brown. In our view, any such contribution will be of minor extent and not sufficient to justify declining the consent, taking into account all of the relevant circumstances.

Assessment of overall effects on the Manawatu River and Estuary

[238] We now consider the overall effects on the Manawatu River and Estuary in more detail. We again start with the identification of the relevant One Plan provisions. The key objectives are set out below, with the relevant supporting policies noted in brackets. We do not address the intensive farming provisions here, but do so later. Our focus in this part of our decision is on the extent to which the proposal meets the relevant provisions in terms of the keystone issue identified in the One Plan related to surface water quality degradation.

Objective 5-1 (water management values) (Supported by Policies 5-1 and 5-4)



Surface water bodies and their beds are managed in a manner which safe guards their life supporting capacity and recognises and provides for the Values in Schedule B

Objective 5-2 (water quality) (Supported by Policies 5-2 to 5-5)

- (a) Surface water quality is managed to ensure that:
 - (ii) water quality is enhanced in those rivers and lakes where the existing water quality is not at a level sufficient to support the Values in Schedule B

[239] We used the sensitivity analysis approach described in paragraph [203] to assess a likely worst-case scenario, and assuming all nitrogen loads reaching the River were 30% higher than predicted. This would still result in a greater than 40% reduction in nitrogen loads compared to the existing situation.

[240] It can be seen from Table 5 in paragraph [228] that the maximum reduction assessed as being necessary to meet the One Plan nitrogen water quality target in the Estuary is 20% based on all river flows, not the 20th FEP set out in the One Plan, which would be less. In the River, the reduction required is 6%, based on the 20th FEP, in accordance with the One Plan. We consider again that this provides a very acceptable margin for safety and we accept that the proposal will meet an equitable share of the zone-wide SIN reduction required.

[241] Dr Ausseil stated that:

With regards to the effects on nutrient concentrations in the Lower Manawatu River, I agree with the conclusion reached by Dr Gillespie that any effects will not be directly detectable, although the FWWTP discharge will contribute to the cumulative loads received by the Lower Manawatu River and [Manawati] Estuary.

and

Under the proposed system, the FWWTP will contribute an estimated 0.1 to 0.5% of the annual loads of SIN and DRP estimated in the Manawatu River at Shannon, as opposed to 0.4 to 0.9% for SIN and 2.0 to 3.7% for DRP under the existing situation

128



¹²⁸ EIC at paras 64 and 65.

[242] Mr Brown noted that the discharge may not be detectable with current analytical methods but there will still be the addition of nutrients that will contribute to cumulative effects. He stated: "This is where the management and the use of best available technology and practices become vital in reducing the effects on surface water¹²⁹."

[243] Our conclusions in relation to the effects of the proposal on the Manawatu River and Estuary are as follows:

- (a) The only contaminants of potential concern are nutrients, with nitrogen being the primary concern;
- (b) The proposal will reduce nitrogen loads to the river and estuary from the FWTP by more than half and phosphorus by substantially more, compared to the current discharge and the future discharge will contribute very small percentages of the total nutrient loads to the river;
- (c) Even total removal of the discharge would not enable the One Plan nutrient targets for the River to be met, but the nutrient reduction achieved by the proposal significantly exceeds the average required to meet the zone-wide reduction required to meet the One Plan targets;
- (d) The proposal will enhance existing water quality and to that extent is consistent with the overall outcomes the One Plan is seeking to achieve through its objectives and policies;
- (e) The nutrient discharges from the proposal will contribute to cumulative effects but any changes will be undetectable, as would any changes in a best-case situation if there was a total cessation of discharge to the river.

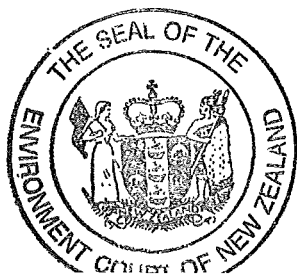
Assessment of overall effects on the Foxton Loop

[244] As noted earlier, Mr Brown gave evidence that he agreed with the Applicant that the current discharge regime is likely to be having a significant adverse effect on the Loop¹³⁰. Dr Ausseil stated that "The complex tidal regime ... makes it difficult to assess with certainty the effects of the current discharge on water quality and ecology of the Foxton Loop¹³¹."

¹²⁹ EIC at para 35.

¹³⁰ EIC at para 17.

¹³¹ EIC at para 5.



[245] Part of this uncertainty arises from a lack of knowledge of the extent to which tidal influences can result in increases in nutrient levels in the eastern arm of the Loop during incoming tides¹³². This has contributed to difficulties in assessing the effects of possible increases in nitrogen levels in the eastern arm with the proposal we are considering. Based on the nitrogen load predictions in Table 4, there could be an increase from 1,154 to 1,633 kg N/y in the eastern arm as a result of the proposal. The same table shows that some 9570 kg N/y is discharged continuously to the western arm of the Loop from the existing FWTP. If it were conservatively assumed that incoming tides occurred for 25% of the time (allowing for outgoing and slack tides), this would mean that around 2,600 kg N/y would be pushed up from the point of discharge towards and, in part, into the eastern arm. While this provides no reliable guidance on how much currently reaches which parts of the eastern arm, it suggests to us that the current loads to the eastern arm are higher (and possibly significantly higher) than those predicted in Table 4.

[246] Based on the evidence we heard, we consider that soils alongside the eastern arm are likely to have attenuation factors greater than the average of 30% adopted for the site as whole. If correct, that would reduce the future loads to that arm. When both of these considerations are taken into account, we consider three possible situations could occur – there could be some increase in nitrogen loads, there could be little change and it is also possible there could be a reduction – we simply have no way of knowing.

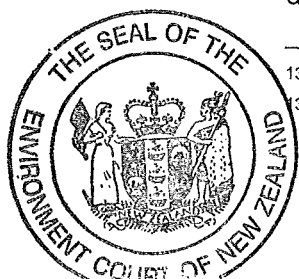
[247] There can be no doubt that removing the continuous discharge will have significant benefits for the western arm with nitrogen loads predicted to reduce by 83% from Table 4.

[248] We note Dr Ausseil's evidence that it seems unlikely that "even complete removal of the FWWTP discharge would see significant reductions in the abundance of submerged macrophyte in the Foxton Loop¹³³."

[249] As for all surface water receiving environments affected by the proposal, there will be almost complete elimination of effects on water clarity, colour, microbiological water quality (*E.coli*), particulate organic matter and soluble biochemical oxygen demand in the Loop as a result of the proposal. Dr Ausseil told us that reductions in

¹³² Ausseil EIC at para 42.

¹³³ EIC at para 53.



dissolved reactive phosphorus exceed the average reductions required to meet the One Plan water quality target on a zone-wide basis.

[250] The Water Considerations Report (LEI 2015: E2) recorded that the One Plan chronic ammonia target was always met¹³⁴. This was based on 36 results from 2000 to 2008¹³⁵. With the proposal in place, we anticipate that the ammonia nitrogen load reaching the Loop will reduce from current levels of more than 5,000 kg/y (based on treatment plant records) to a substantially lower figure, as we were told that very little ammonia-nitrogen will enter surface waters from the irrigation system. Taking these various factors into account, we consider it highly unlikely that ammonia toxicity resulting from the wastewater system will be a significant issue in the future.

[251] Overall, we are satisfied that there will be substantial reductions in all contaminants discharged to the Loop and that as a result of the proposal any remaining contaminants will have limited, if any, potential to cause significant adverse effects with the possible exception of nitrogen. It is not possible to determine the future effects of nitrogen with any certainty, including the effects on macrophyte growth. However, it must be kept in mind that the diversion of the Manawatu River from its original course is by far the biggest contributor to adverse environmental effects in the Loop. Even complete removal of the discharge from the Loop may not result in significant reductions in macrophyte growth.

[252] In terms of One Plan Objective 5-2(a)(ii), as in relation to the Manawatu River and Estuary, the proposal will result in enhancement of existing water quality in an environment that currently does not meet the One Plan Values in Schedule B.

Overall conclusions in relation to effects on the surface water environment

[253] We are satisfied that the proposal will result in a substantial reduction in nutrient loads discharged to the surface water environment, will contribute more than the average share of the nutrient removal required to meet the One Plan zone-wide water quality targets and that any contribution to cumulative effects will be undetectable.

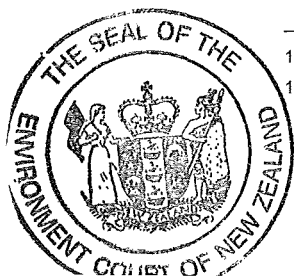
[254] It is also clear from the various experts' evidence that effects of the proposed land based discharge on sediment loads, water clarity and/or colour, particulate

¹³⁴

Ausseil EIC at para 25(c).

¹³⁵

Water Considerations Report (LEI 2015:E2), Figure 4.4.



organic matter, BOD or *E.coli* will be negligible. We note that this is relevant to one of the matters of discretion for Rule 14-4, which is measures to avoid, remedy or mitigate nutrient leaching, faecal contamination and sediment losses from the land.

[255] Subject to effective sediment control during the construction phase of the project, we do not see any potential for the proposal to exacerbate the current adverse effects of sediment in the Manawatu River or Estuary.

[256] Taking into account the above analyses, we considered the effect on the One Plan water quality values set out in paragraph [203] of our decision. We are satisfied that the proposal will contribute positively towards achieving all of the values and will not result in any increased adverse effects on those values, including at the Ramsar site.

[257] Overall, we are satisfied that the proposal is consistent with the relevant One Plan objectives and policies relating to surface water quality degradation. However, this does not address the intensive farming provisions and does not resolve the issue of what constitutes the BPO. We come to those matters later.

[258] There was agreement between water quality experts that the adverse effects of the existing discharge are significant¹³⁶. It is unavoidable that the existing discharge will have to continue in its present form for some time as a matter of practical reality. We do not see any meaningful opportunities to improve treated wastewater quality in the short term, but we do see the potential to reduce the adverse effects of the FWTP by ensuring irrigation is commenced as soon as practicable.

Assessment of effects of discharges to air

[259] The relevant provisions of Objective 15-1 are:

The management of air quality in a manner that has regard to:

- (a) maintaining or enhancing ambient air quality in a manner that safeguards the health of the Region's community,
- (c) managing air quality so that it is not detrimental to amenity values



¹³⁶

Ausseil EIC at para 5, Brown at para 17 and McArthur at paragraph 26.

[260] Matters relating to air quality were addressed in the evidence of Mr Curtis¹³⁷ and Mr Cudmore¹³⁸ and in the air quality JWS. The JWS showed a high level of agreement between the experts with the main point of disagreement being whether some matters should be included in conditions or a management plan. We note that at the time of the expert conference, no draft management plan had been prepared but one has since been provided to the Court. We address this later in our decision.

[261] The experts took into account the proposed method of sewage treatment and irrigation and the locations of the closest houses and points of access to the locality discussed in paragraphs [109] to [113] above. They recommended a number of conditions that, if followed, would provide appropriate protection of public health and manage the effects of odour outside the site boundary. We agree with the recommended approach, subject to some minor amendments to the proposed conditions, which we set out later, and consider the proposal is consistent with the relevant One Plan provisions relating to air quality.

Assessment of effects on cultural values

[262] Chapter 2 of the Regional Policy Statement addresses Te Ao Maori. Objective 2.1 is:

- (a) To have regard to the mauri of natural and physical resources to enable hapū and iwi to provide for their social, economic and cultural wellbeing.
- (b) Kaitiakitanga must be given particular regard and the relationship of hapū and iwi with their ancestral lands, water, sites, wāhi tapu and other taonga (including wāhi tūpuna*) must be recognised and provided for through resource management processes.

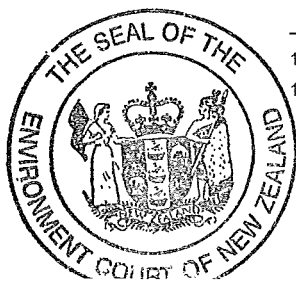
[263] The Applicant and affected iwi have worked cooperatively over extended periods of time to address effects of the proposal on cultural values. After reaching agreement with the Applicant, Te Taiao O Ngati Raukawa and Te Roopu Taiao o Ngati Whakitere withdrew from proceedings by way of memorandum dated 28 September 2017. In view of this, we consider effects on the cultural values of the two iwi have been addressed to their satisfaction. As noted earlier in our decision agreement has been reached between Rangitaane O Manawatu (RoM) and the Council.

¹³⁷

Engaged by the Regional Council.

¹³⁸

Engaged by the Applicant.



[264] We rely on these agreements as evidence that cultural effects have been addressed to the satisfaction of affected iwi and hapu and that the above objective has been met.

Assessment of effects on other sensitive areas

[265] Policy 14-5 of the One Plan - Management of intensive farming land uses is relevant to our assessment of effects and is set out in para [5] above. Policy 14-6 provides:

When making decisions on *resource consent* applications, and setting consent *conditions*, for intensive farming *land* uses the Regional Council must:

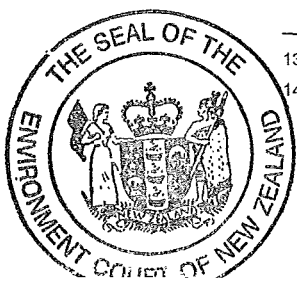
- (d) Ensure that cattle are excluded from surface water in accordance with Policy 14-5 (f) and (g) except where landscape or geographical constraints make stock exclusion impractical and the effects of cattle stock movements are avoided, remedied or mitigated. In all cases any unavoidable losses of nitrogen, phosphorus, faecal contamination and sediment are remedied or mitigated by other works or environmental compensation. Mitigation works may include (but are not limited to) creation of wetland and riparian planted zones.

[266] A submission was received from the Wildlife Foxton Trust that “all cattle should be fenced from riparian zones as a condition of the consent.” The Royal Forest and Bird Protection Society Incorporated of NZ (Forest and Bird) made a submission along more general lines, identifying its key matter of concern as the protection of ecological values. Counsel for Forest and Bird made a submission to the hearing seeking a condition that:

The Consent Holder shall ensure that any stock on the land are excluded from the Manawatu River and Foxton Loop and any rare or threatened habitat as defined by Schedule F in the One Plan as identified in Plan 13a.

[267] In a memorandum dated 10 November 2017, counsel for Forest and Bird sought the areas where fencing is required under general condition 30 be extended to include all the significant indigenous vegetation on Dunes 5-7.

[268] Matters relating to terrestrial and wetland ecology are addressed in the evidence of Dr V F Keesing¹³⁹ and Mr J Lambie¹⁴⁰ and in the JWS on terrestrial and



¹³⁹

Engaged by the Applicant.

¹⁴⁰

Engaged by the Regional Council.

wetland ecological matters. The JWS recorded there was no material disagreement between the experts.

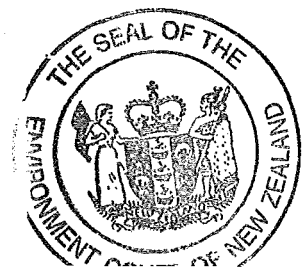
[269] The experts agreed that the kanuka and kanuka/broadleaved habitats mapped on dunes 5, 6 and 7 collectively constitute “threatened” habitat but that other areas do not constitute significant native vegetation for the purposes of protecting indigenous habitat under the One Plan. They agreed that the areas of threatened habitat warrant protection through avoidance of effects. They further agreed that Plans A13(a) and A15(a) show the wetland areas to be protected, with buffers and the areas to be irrigated. They also agreed that compliance with the map, together with a condition requiring the avoidance of irrigation onto the roots of native trees outside irrigated areas and the avoidance of wetland areas will be sufficient to ensure protection of the areas of concern. They considered that spray drift from the irrigation system is unlikely to be harmful to kanuka¹⁴¹.

[270] At the hearing, counsel for the Applicant referred to general condition 30 and the associated plan 102 showing the kanuka areas to be fenced which are areas Forest and Bird considered should be expanded.

[271] In his rebuttal evidence, Dr Keesing acknowledged that in his main brief of evidence he supported fencing of certain areas, especially given the proposed intensification of stocking, subject to some uncertainties. However in his rebuttal evidence he stated:

In relation to the kanuka vegetation, I now understand that the Project will not cause any change in stocking rates of those areas. That is because the irrigated areas under the Project will be fenced off from the rest of the farm and it is these areas that may receive (due to more grass growth) an increase in stock density. I understand from Mr Lowe's rebuttal evidence that this is necessary to ensure the management of stock within the irrigated areas. As the irrigated areas avoid the kanuka habitat this fencing will ensure that the intensification of farming associated with the project will not occur within the kanuka areas I was concerned about. I support this fencing as achieving the avoidance of an effect I was concerned about and which was sought through conferencing.

¹⁴¹ Terrestrial and wetland ecological matters JWS, pages 2 and 3.



[272] We questioned Ms Johnston as to whether the Regional Council's ecologist, Mr Lambie supported the fenced areas shown on plan 102 and she confirmed that he did

[273] Mr Allen (for the Applicant) advised in his submissions to the reconvened hearing that the fencing and exclusion of stock from the identified areas of kanuka, wetlands and along the western edge of Matararapa formed part of an agreement with Ngati Raukawa¹⁴².

[274] Dr Keesing and Mr Lambie proposed a number of conditions to ensure protection of the threatened kanuka areas and wetlands and these are generally incorporated in the conditions attached to this interim decision.

[275] Mr Knight¹⁴³, who manages farming operations at the application site gave evidence that:

Stock currently graze the entire farm, including through all areas of the kanuka forests and the margins of some wetlands or marshy areas. Despite the regular grazing by cattle over many years, the kanuka forests have matured and spread to cover more of the farm land area, especially on the dunes. This can be seen when looking at historical aerial photos, which is most noticeable on the highest dune areas. It should be noted that up until several years ago we had a spraying programme to kill the kanuka, as it grew everywhere. We tried hard grazing to get rid of it, but this meant the pastures were grazed too hard and the area was subject to wind erosion. The Council have discussed with me the possibility of fencing off some of the kanuka forests and wetland areas as part of the Project. I am reluctant due to the need to manage weeds and in any case, as noted above, the kanuka does not need protection from stock grazing in order to thrive.

[276] Based on the above we are satisfied that the proposal includes appropriate protection of significant and/or threatened indigenous vegetation and that the relevant One Plan provisions are met.

Assessment of positive effects of the proposal

[277] We consider the proposal will result in significant positive effects that will:

- (a) Provide an environmentally sustainable means of meeting the essential wastewater treatment and disposal needs of the Foxton community;

¹⁴²

At paragraph 52.

¹⁴³

EIC at para 43.



- (b) Provide for the stated preference of **all** parties to proceedings that the discharge of treated wastewater should be to land and not direct to the waters of the Manawatu River;
- (c) Result in percentage reductions in nutrient loads to the aquatic environment that will be better than the averages required at a zone-wide level to meet the relevant One Plan water quality targets, even taking into account uncertainties and likely worst-case predictions;
- (d) Eliminate or substantially reduce other wastewater derived contaminant discharges to the environment;
- (e) Contribute positively towards meeting the relevant One Plan values in Schedule B;
- (f) Provide appropriate protection of sites of cultural significance, other sensitive areas and public health and community well-being.

Evaluation of overall effects

[278] Firstly, we confirm that, subject to conditions as attached to this interim decision, we consider that ecological, air quality, archaeological, heritage, visual, landscape, natural character, amenity, recreational, flooding and construction effects arising from the proposal will be of limited extent and, both individually and collectively, are not sufficient to affect a decision to grant consents.

[279] We recognise there will be effects on groundwater within and in the vicinity of the application areas as a result of increased nitrate nitrogen concentrations.

[280] We consider that the proposal will result in overall positive benefits for the Loop as a whole. There may be some change in adverse effects on the eastern arm. It is not possible to be sure if they will be greater or less than at present but, in any event, are unlikely to be discernible either way.

[281] As Te Taiao O Ngati Raukawa, Te Roopu Taiao o Ngati Whakatere and Rangitaane o Manawatu have reached agreement with the Applicant we consider effects on their cultural values have been addressed to their satisfaction.

[282] We consider that from the perspective of overall effects on the environment, the proposal put forward by the Applicant will be significantly positive.



Part F
Statutory Analysis

[283] Planning evidence was provided by Mr St Clair¹⁴⁴, Ms Cook¹⁴⁵ and Mr H D Edwards¹⁴⁶. Two planning JWS were also presented to the Court.

Existing environment

[284] Before undertaking our statutory analysis, we first consider the issue of what constitutes the existing environment. The planning experts understand “from a planning perspective that, existing activities authorised under the previous consent but requiring new consents (renewal) are not considered to be part of the existing environment¹⁴⁷. We consider the experts to have adopted the correct approach.

Activity status

[285] The planning experts agreed that under the District Plan, the proposal is a discretionary activity under Rules 19.4.7(a) and 19.4.8(ii), and that under the One Plan, the proposal is overall a Discretionary Activity (bundled), under Rules 13-2, 14-30, 14-4 and 15-17¹⁴⁸. We accept their evidence.

The planning evidence

[286] We address the planning evidence in the order adopted by the planning experts in their JWSs but note that we only address provisions remaining under consideration and not dealt with elsewhere in our decision. By way of initial comment, we are satisfied that the proposal is in accordance with the relevant national policy statements.

District Plan

[287] The planning witnesses agreed that if the site is not considered waahi tapu in its entirety and all identified areas and sites of culturally significant, waahi tapu, wahi tupuna and other taonga are avoided, then the proposal is consistent with the objectives and policies of the District Plan¹⁴⁹. It was not established that the site is waahi tapu in its entirety. Indeed we go further and say that we are satisfied it is not.

¹⁴⁴ Engaged by the Regional Council.

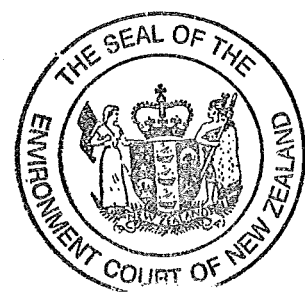
¹⁴⁵ Employed by the District Council.

¹⁴⁶ Engaged by the Applicant.

¹⁴⁷ Planning JWS, 9 and 10 March, page 7.

¹⁴⁸ Planning JWS, 9 and 10 March, page 2.

¹⁴⁹ Planning JWS, 9 and 10 March, page 4.



We are also satisfied that the conditions proposed for any consent will ensure the areas and sites identified will be avoided. Accordingly, we are satisfied that the proposal is consistent with the objectives and policies of the District Plan.

Manawatu Rivers Leaders Accord

[288] The planning experts agreed that the Manawatu Rivers Leaders Accord is a relevant “other matter” to be considered but made no further comment¹⁵⁰. While the Accord is voluntary and has no statutory status, it has widespread endorsement and is held in high regard by the parties and much of the community. We understand that through the Accord the District Council committed to removing treated wastewater discharges from the River and its tributaries when flows in the River are below the half median. The proposal before the Court is consistent with the Council's commitment and consequently is consistent with the Accord.

Regional Plan

[289] The only objective or policy the experts identified as not being met is Policy 14-5¹⁵¹ but we note there are inter-related policies in Chapter 5 of the RPS. As noted earlier in our decision, the policy relates to land used for intensive farming and we have largely addressed this earlier in our decision.

[290] Table 14.2 sets cumulative maximum nitrogen leaching rates to be achieved at five-year intervals for different land use capability classes to be considered as a controlled activity. On a whole of farm basis, the leaching rate applied for was 28 kgN/ha/y which reduces to 25 kgN/ha/y when 10% for double counting is deducted. This exceeds the relevant controlled activity threshold of 13 kg/ha/year. As indicated in paragraph [10] above, approximately half of this will result from treated wastewater application and approximately half from intensive farming.

[291] Based on Mr Lowe's evidence (and if we were to consider lining of the oxidation ponds) there are options available to meet the Table 14.2 limits, but at what cost and what practical benefit to the environment? We come back to this later.

Regional Policy Statement (RPS)

[292] The planning experts addressed a number of RPS objectives and policies, and we have set out our findings on them earlier in our decision. We see no value in

¹⁵⁰ Planning JWS, 9 and 10 March, page 4.

¹⁵¹ Planning JWS, 9 and 10 March, page 4.



addressing these provisions further but instead summarise our key findings below, except in relation to intensive farming activities, which we address as part of our discussion on BPO immediately below the table.

RPS reference	Topic	Finding	Reasons
Objective 2-1 (Te Ao Maori)	Have regard to mauri Kaitiakitanga must be given particular regard	Met	Agreements reached between iwi and Applicant
Objective 3.1 Policy 3.1	Have regard to the benefits of regionally significant Infrastructure Allow minor adverse effects arising from such infrastructure	Met	Provided for and any minor effects allowed
Objective 5-1 Policies 5-1 and 5-4	Water management values	Met to the greatest extent practicable taking into account BPO	There is no practicable alternative that could meet these provisions There will be almost complete removal of most contaminants and very significant reductions in others
Objective 5-2 Policies 5-2 to 5-4	Water quality	Met to the greatest extent practicable taking into account BPO	Any effects on the Manawatu River and Estuary will be undetectable and are likely to be less than minor. There will be no more than minor adverse effects on the Foxton Loop from most contaminants Cumulative effects will be addressed to the greatest extent practicable by adopting the BPO
Policy 5-5	Management of water quality in areas where existing water quality is unknown	Relates primarily to the eastern arm of the Foxton Loop and is met to the greatest extent practicable taking into account BPO	There is no practicable alternative that could meet this provision Increased effects will arise, if at all, only as a result of nitrogen, which will be managed by applying the BPO
Policy 5-6	Requirement to maintain or enhance groundwater quality	Exception applies	The exception better meets the purpose of the Act than discharge to water and BPO applies
Policy 5-7	Land use activities affecting	Not met in terms of	Refer later discussion on the BPO, including in relation to Policy 14-5



	groundwater and surface water quality	intensive farming activities	
Policy 5-8	Regulation of intensive farming land use activities affecting groundwater and surface water quality	Not met	As Policy 5-7
Policy 5-11	Human sewage discharges	Met	Requires that notwithstanding other policies in Chapter 5, all discharges must be onto, into or over land

[293] Objective 15-1 of the Regional Plan relating to discharges to air is met, with effects of odours and on public health managed by conditions.

What constitutes the Best Practicable Option for this case?

[294] The Applicant considers the proposal now before the Court is the BPO and while it is generally consistent with the relevant provisions of the One Plan, it is inconsistent with the directive provisions of Policy 14-5. However, we have identified the ambiguity in this policy earlier in our decision.

[295] It is clear to us that lining the existing ponds and/or providing enhanced nitrogen removal by way of treatment plant upgrading would have a number of benefits in terms of reduced nitrogen discharges.

[296] Against this, it is necessary to take into account that lining the ponds would present particular and significant technical challenges and risk of increased adverse effects on the environment during construction and substantially increased costs. The same general considerations would apply to providing enhanced nitrogen removal. On our evaluation of the evidence there is a high likelihood that the construction of a completely new treatment plant would be required to achieve the desired outcomes. This would probably result in significant delays in terms of removing the current direct discharge to the Loop. Not only would additional time be required for investigations, design, construction and commissioning but potentially also a need for new resource consents and/or a new designation or variation to the existing designation, with potentially significant additional time delays.



[297] Mr Lowe advised that the land surrounding the existing FWTP is Maori Land and its acquisition or lease would require consultation and Maori Land Court processes to be followed, with further potential for delays.

[298] If modifications to the existing FWTP were possible to achieve the desired outcomes, timing could again be an issue and there could be a serious risk of adverse effects on water and air quality for significant periods. We have no basis of assessing these risks based on available information.

[299] We have also considered the issue of costs and affordability. In response to questions from the Court at the reconvened hearing, Mr Lowe provided further evidence (recorded by the Court as the final statement of evidence dated 19 December 2017 from Mr Lowe) on possible treatment plant upgrade costs. Indicatively only, in addition to the current projected total cost of the project of \$7.2 million, he estimated the following costs could apply:

- Line all the existing ponds - an additional \$2 million giving a total cost of \$9.2 million;
- Total new pond system, or provide treatment to remove up to 50%, of an additional \$4 million, in addition to pond lining costs, giving a total indicative total cost of \$13.2 million for the revised project.

[300] We were advised by Mr Allen that an increase in capital costs of \$2.5 million would result in an increase in rates for ratepayers connected to an HDC wastewater system of \$37 a year per ratepayer. On a pro rata basis, an increase of \$6 million in capital costs would increase the rates by approximately \$90 per ratepayer per year. This would be in addition to the projected increase from \$573.20 per year in 2015/16 to \$1,077.80 per year in 2024/25¹⁵². We acknowledge the evidence of Mr Saily that “this significant rates increase falls largely on those least able to afford it¹⁵³.”

[301] We have also considered the economic evidence of Mr P W J Clough relating to affordability and equitability for the communities affected. He stated at paragraph 28 of his EIC that HDC has arrived at the current proposal for the project by trying to strike a balance between attaining improved discharges to meet community aspirations and the region’s One Plan requirements, while keeping costs affordable to its constituents.

¹⁵² Saily EIC at para 7.
¹⁵³ Saily EIC at para 195.



[302] There was no evidence to challenge the Council's position on affordability. Further, the Council has demonstrated a responsible approach to addressing wastewater issues in the District generally and has followed comprehensive programmes of community consultation before arriving at its proposed solution for Foxton.

[303] There are already significant positive benefits from the proposal as outlined earlier in our decision. In terms of the only contaminant discharge of potential remaining concern (nitrogen) the proposal achieves significantly greater reductions of current discharge levels than the average zone-wide reductions required to meet One Plan water quality targets. Under these circumstances we do not consider it appropriate to require additional works at considerable extra cost to the local community when the likelihood is that any environmental benefits that may result will not be perceptible or measurable.

[304] We therefore agree with the Applicant that the proposal before us is the BPO.

Resource Management Act

[305] We have considered the effects of the proposal on the environment as required by s 104(1)(a) of the Act. Subject to conditions and the BPO as outlined above we are satisfied that potential adverse effects on the environment (if any) can be managed to all intents and purposes to be minimal and that, overall, there will be significant positive effects. As required by s 104(2A) we have regard to the value of the FWTP as existing infrastructure which avoids the need for expenditure for replacement infrastructure on other potential sites which we have identified.

[306] We have considered the One Plan and other relevant planning provisions in considerable detail and conclude that the proposal with the BPO as outlined above is generally consistent with or not contrary to the relevant statutory planning documents.

[307] We have considered the requirements of s 105 of the Act in relation to:

- (a) The nature of the discharge and the sensitivity of the receiving environment to adverse effects;
- (b) The Applicant's reasons for the proposed choice; and



- (c) Any possible alternative methods of discharge, including discharge into any other receiving environment.

We are satisfied that all of these issues are satisfactorily addressed by this proposal.

[308] We do not consider that any of the provisions of s 107(1) operate to require that consent is declined.

[309] For the reasons stated earlier in our decision, in reaching a decision on this matter we have had regard to Part 2 RMA..

[310] We are satisfied that the proposal recognises and provides for the matters of national importance identified in s6 to the extent that they are relevant in this case. The proposal has particular regard to the relevant other matters in s 7, being: (a), (aa), (b), (c), (d), (f) and (g). The proposal takes into account the principles of the Treaty of Waitangi.

[311] We consider that the proposal achieves the purpose of RMA. It enables the Foxton community to develop a necessary physical resource (the FWTP) in a way which provides for their social well being and for their health and safety while addressing the imperatives set out in s 5(2)(a) – (c) RMA.

[312] We are satisfied that we should grant the consents sought, subject to the imposition of appropriate conditions.



Part G
General matters

The role of any management plan or plans

[313] Management plans can have a role in managing effects on the environment, namely to set out the methods to be used to ensure conditions of consent will be met. They cannot be used to resolve basic requirements for environmental protection outside consent processes complying with the Act. We have reviewed the draft operation and management plan attached as Appendix F of Mr Lowe's rebuttal evidence, and consider it is consistent with these principles. Final approval of the plan is a matter for the consent authorities and not this Court. Consequently, we have not considered the document in detail. We note that changes will be required and are proposed to reflect the final outcomes of this hearing, but consider the overall content to be broadly in line with our expectations for such documents.

Requirements for peer reviews

[314] In view of the complexity of the proposal overall and the many changes that have occurred through the process, we consider that a peer review of the management plan to be submitted before commencement of the project, prior to submission to the consent authorities, should be a requirement. We also agree that a peer review of storage requirements should be undertaken as part of the detailed design process. We have included conditions to require these peer reviews, including that they be undertaken by an appropriately qualified expert or experts.

Need for a community liaison group

[315] We generally see considerable value in community liaison groups for proposals of this nature. However, local experience of the practical operation of these groups has been significantly adverse and led us to conclude that such a group would add little value and would more possibly detract from good outcomes. Accordingly, we do not require such a group as a condition of consent but note there is nothing to stop the Council from reconsidering this on a voluntary basis if circumstances change in the future.



Other considerations

[316] We note that the Applicant intends to apply for an archaeology authority in accordance with s 42 of the Heritage New Zealand Pouhere Taonga Act 2014 and this is supported by Heritage New Zealand¹⁵⁴.

[317] We note that the Applicant intends to determine if consents will be required under the National Environmental Standard for Assessing and Managing Contaminants in Soil to Protect Public Health at the time of detailed design¹⁵⁵.

Monitoring and reporting

[318] We accept the monitoring and reporting programmes as now agreed between the experts and accepted by the Applicant and the consent authorities.

Term of consents

[319] The Applicant is seeking a 3-year term for the temporary discharge to the Loop. The Regional Council's s 87F report accepts this term and we consider it is appropriate.

[320] With regards to the application made to the District Council, an unlimited term was sought for the land use consents in accordance with s 123 (b) RMA. In the event that these consents are issued, Ms Cook considers it appropriate that an unlimited term be granted¹⁵⁶. We agree.

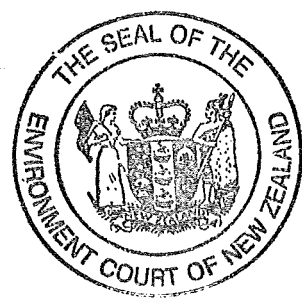
[321] Planners for the Applicant and Regional Council have agreed a 31-year term is appropriate for the remaining regional consents to align with common expiry dates for the catchment. A range of views was expressed by other parties, some seeking a term as short as 10 years.

[322] In considering this term, we referred to Policy 12-5(a), (b) and (c) of the One Plan as our starting point. We gave particular consideration to (c), which gave rise to considerable debate between members of the Court. All members of the Court consider that the spraying of treated wastewater and then using intensive bull beef farming to utilise the pasture generated creates potential difficulties at Matararapa

¹⁵⁴ Submission dated 18 February 2016 from Heritage New Zealand in relation to resource consent applications.

¹⁵⁵ Edwards EIC at para 53.

¹⁵⁶ Section 87F Report at para 5.113.



especially when the nitrogen leaching provisions in Table 14.2 of the One Plan are taken into account.

[323] As previously stated we consider the One Plan lacks adequate guidance in the situation where this combination of activities occurs on the same land area. However, we have concluded that the proposal represents the best practicable option and took that into account when making our findings on the term of consent. We seriously considered a shorter-term consent, but concluded that the community needs certainty for essential infrastructure and this supported a longer term.

[324] We also took into account that the proposal:

- (a) Satisfies the surface water quality objectives and policies of the One Plan, being one of the four key issues the plan seeks to address;
- (b) Contributes positively to meeting the relevant One Plan values for surface water and to meeting surface water quality targets; and
- (c) Best meets the purpose of the Act.

[325] Taking all of those matters into account, we consider a 31-year term is appropriate but subject to reviews as set out below.

Review of consents

[326] We are aware that the Applicant and Regional Council have different views on timing and frequency of reviews. We have considered both positions and the evidence as a whole. In view of the uncertainties associated with the proposal, we consider that there should be an initial operational review no later than two years after commencing irrigation to allow for any initial start-up issues to be resolved. Thereafter, and subject to a satisfactory initial review, reviews shall be every three years with provision to move to five-yearly reviews after two consecutive three-yearly reviews showing satisfactory operation.

[327] These reviews are limited to the extent to which the operating procedures adopted satisfy the relevant resource consent conditions. They are in addition to the optimisation investigation required by Condition 33 of the General Conditions, but can be undertaken as part of the same process when timing allows.



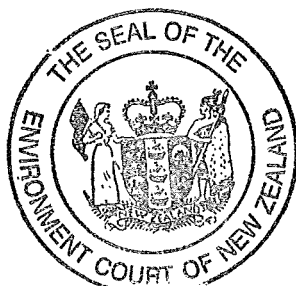
Conditions

[328] A number of changes to the proposed conditions are required as set out below. Proposed conditions not referred to below are accepted, but there would be benefit in some minor editing to correct some of the text and word spacing.

- (a) Discharge consent ATH-2015200444.00 - To discharge treated wastewater to land from the ponds of the Foxton Wastewater Treatment Plant
 - i) A new sentence is to be added at the start of Condition 2 along the following lines - The Consent holder must de-sludge the ponds as soon as reasonably practicable and in any event, prior to the commencement of irrigation of treated wastewater to land; and
- (b) Discharge consent ATH-2015200584.00 - To discharge treated wastewater and odour to air associated with the receipt, treatment, storage and discharge of wastewater from the Foxton wastewater treatment plant
 - i) Condition 8 is to be amended to include details of the complainant, where known, and the follow up undertaken to inform the complainant about actions taken in response to the complaint. Preferably, the same wording should be used as that used in Condition 7 of the General Conditions to ensure consistency, including times for notification and reporting of complaints. Alternatively, reliance can be placed on the General Conditions.
- (c) Land use consent 501/2015/3691 - For erection of structures in a coastal natural character and hazard overlay area and Manawatu Estuary outstanding natural landscape and feature overlay area to enable the establishment and operation of a network utility operation; and establishment, operation, and ongoing maintenance of a network utility in a flood hazard overlay area, including irrigation
 - i) Figure A6 needs to be attached to the consent, as referred to in Condition 8.
- (d) Discharge consent ATH-2015200585.00 - to discharge treated wastewater from the Foxton wastewater treatment plant onto or into land by irrigation which may enter water
 - i) In Condition 3, clarification is required as to whether a single level sensor is required for all ponds, or separate sensors are to be provided in the existing oxidation ponds and the new lined storage pond, which we anticipate could depend on design;



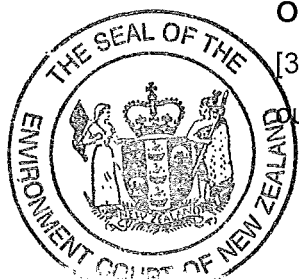
- ii) In Condition 13a, the location of the Dissolved Oxygen sensor should be specified to be as close as practicable to the points of treated wastewater discharge, as near as practicable to the end of the common distribution pipe serving all irrigation areas;
- iii) New conditions must be included that:
- Limit the maximum annual average discharge volume of treated wastewater to irrigation to 2,000 m³/d;
 - Specify the maximum allowable annual average discharge load of total nitrogen that can be discharged in treated wastewater, using the same treated wastewater concentrations used in evidence presented to the Court in relation to applied nitrogen loads. This will be the primary control on nitrogen discharge loads, supplemented by, and consistent with the per hectare loads set out in Condition 19; and
 - Irrigation is to commence as soon as practicable to minimise the period of continuing discharge to the Foxton Loop.
- iv) As noted in paragraph [93] of this decision, we do not consider reviews to be necessary for each new version of Overseer for the purposes of managing this consent. However, if the Applicant and the Respondent see merit in retaining Condition 30 they should provide reasons for consideration by the Court.
- (e) Land use ATH – 20152004586.00 – Intensive farming
- i) As noted in paragraph [91] of this decision, we do not consider annual average nitrogen losses below the root zone to have any practical benefit as a control in view of the particular circumstances applying to this case. However, if the Applicant and the Respondent see merit in retaining Conditions 4, 4a and 12 they should provide reasons for consideration by the Court.
- ii) In the event that Conditions 4, 4a and 12 are not retained, a replacement condition is to be provided to provide for a review every five years to check if the original assessment remains valid, and possible intermediate reviews as described in paragraph [93] of this decision;



- (f) Schedule 1 – General Conditions
- i) Condition 8 is to be amended to include details of the follow up undertaken to inform the complainant about actions taken in response to the complaint.
 - ii) Condition 20 is to be amended to include standards for the management of construction noise and vibration;
 - iii) Conditions 24 and 27 are to be clarified to say if the sums of \$2,500 and \$3,000 per year respectively are the total payments to all iwi or to each iwi;
 - iv) Condition 34 e) should be amended to read: “alternative methods of **treatment and** discharge at the Matararapa site;”
 - v) New conditions must be included requiring that:
 - A one-off independent peer review (by a suitably qualified person(s)) of those aspects of the Operations and Management Plan required by Condition 11 that affect nitrogen losses to the aquatic environment to ensure such losses are minimised to the greatest extent practicable, taking into account the approved treatment, storage and irrigation systems;
 - Any upgrading of the site electricity supply must have sufficient capacity to allow for future upgrading of the FWTP using aeration if found to be necessary unless it can be demonstrated that it would be more cost effective to provide a further upgrade at the time aeration is found to be necessary; and
 - Provision is made for reviews of trade waste loads and infiltration flows at appropriate intervals, taking into account the relevant provisions for infiltration and inflow controls applying to other wastewater treatment plants in the region.
- (g) General requirements relating to reviews associated with all aspects of the treatment plant and treated wastewater disposal system after cessation of discharges to the Foxton Loop shall be as set out in paragraphs [326] and [327] of this decision.

Outcome

[329] Consents will be granted subject to conditions, which are to be finalised as outlined above.



Directions

[330] The Applicant is to propose changes as outlined, and seek comment from other parties before submitting a revised set of conditions for consideration by the Court by 5 p.m. on Friday 19 October 2018. In the event of disagreement as to the wording of conditions, this is to be explained in a joint memorandum of counsel at the time of submission.

[331] While we have recorded our understanding of the most up-to-date information presented to us though the hearing, this resulted in significant challenges because of the extensive and on-going changes that occurred through the process. In the event that any party identifies any errors of fact in the decision which are determinative as to outcome, they must advise the Court by 5 p.m. on Friday 28 September 2018. Matters of opinion or attempts to relitigate positions must be avoided.

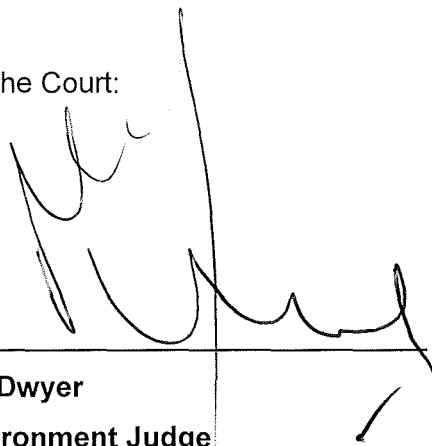
Costs

[332] Any issues of costs will be dealt with at the time of issue of a final order reflecting this interim decision. We note the provisions of s285 RMA as they apply to these proceedings.

Authorship

[333] Commissioner Hodges is the primary author of this decision which reflects the unanimous views of the Court.

For the Court:

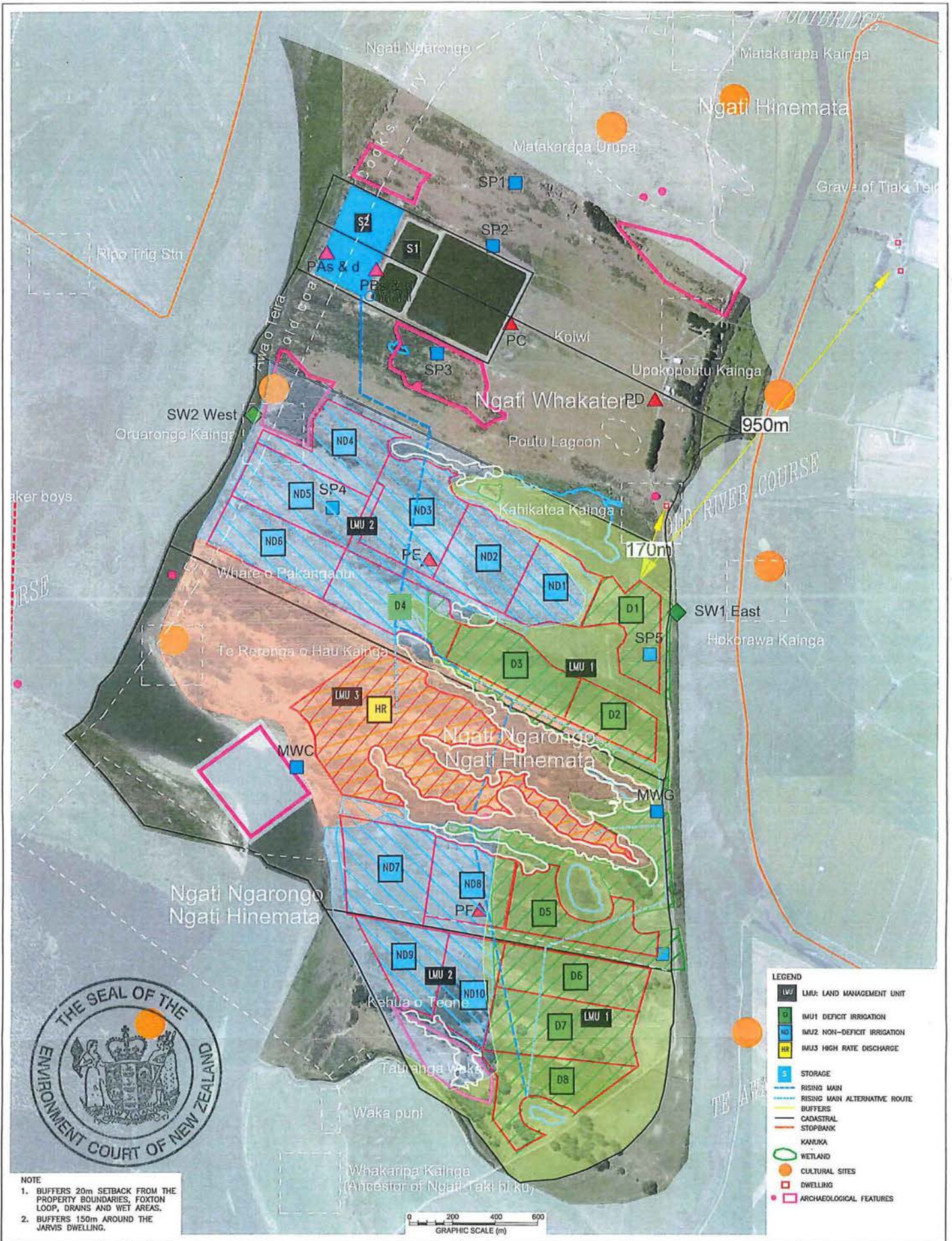


B P Dwyer
Environment Judge



Annexure 1





Rev	Amendments	Issued	Date	Recommended
				Approved
A	FOR COURT HEARING REQUEST	NSH	03/17	
		Checked	Date	Infrastructure Services
Surveyed				
Landscaping				
Designed	PL	HL	20/04/2018	
Drawn	NSH	PL	20/04/2018	

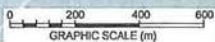
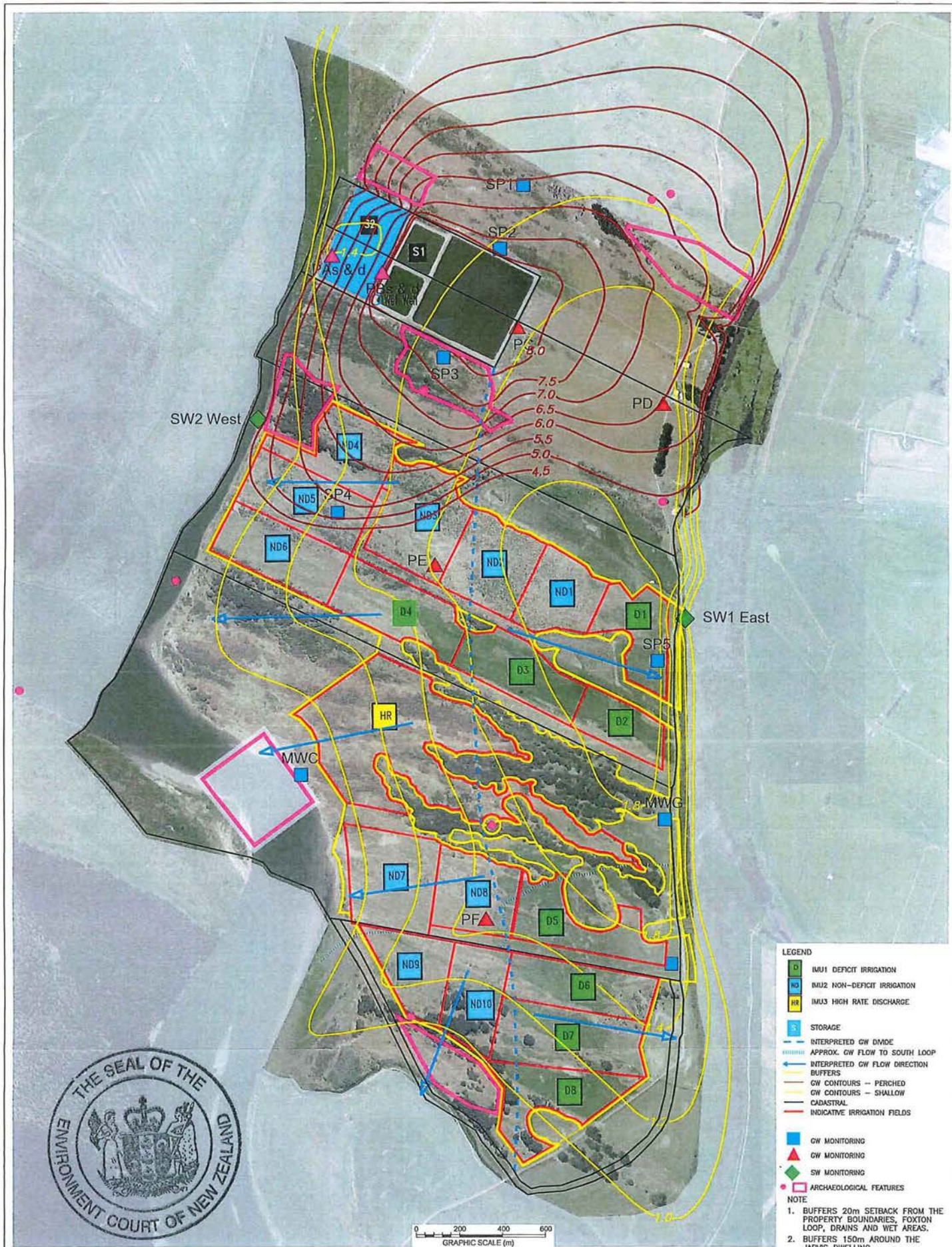
Horowhenua
DISTRICT COUNCIL

FOXTON WASTEWATER TREATMENT PLANT CONSENTING

FIGURE EC1 INDICATIVE DESIGN CONCEPT AND SENSITIVE RECEPTORS (SOURCES:VARIOUS)

Scale	A1 - 1:4,000 A3 - 1:8,000
Plan no.	10172-EC1
Revision	Sheet of sheets
R A	

Annexure 2



Rev.	Amendments	Initial	Date	Recommended
				Approved
A FOR COURT HEARING REQUEST NSH 03/17				
Checked Date				
Infrastructure Service				
Surveyed				
Landscape				
Designed	PL	HL	20.04.2018	
Drawn	NSH	PL	20.04.2018	



Job Title
 FOXTON
 WASTEWATER TREATMENT
 PLANT CONSENTING

Drawing Title
 FIGURE EC2
 INDICATIVE DESIGN CONCEPT
 & INFERRED GROUNDWATER FLOW
 (SOURCE: LEJ, 2015:C7,A7,GHD)

Scales	A1 - 1:4,000 A3 - 1:8,000
Plan no.	10172-EC2
Revision	Sheet of sheets
R A	

DOUBLE SIDED

ORIGINAL
Decision No. A061/2001

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of an appeal under section 120 of the Act

BETWEEN **PVL PROTEINS LIMITED** and another
(RMA 1156/99)

Appellant

AND

THE AUCKLAND REGIONAL COUNCIL

Respondent

BEFORE THE ENVIRONMENT COURT

Environment Judge D F G Sheppard (presiding)
Environment Commissioner I G C Kerr
Environment Commissioner J Kearney

HEARING at **AUCKLAND** on 26 and 27 March 2001

COUNSEL

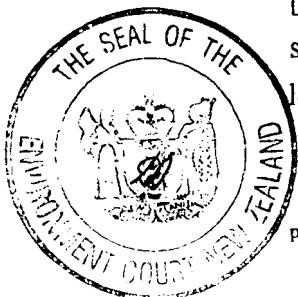
D A Kirkpatrick and W Embling for the appellant
B I J Cowper and S Pond for the respondent

DECISION

Introduction

[1] The appellants, PVL Proteins Limited and Auckland Meat Processors Limited, had applied to the Auckland Regional Council for resource consent to discharge contaminants to air from the operation of a slaughterhouse, rendering plant, hot water and steam raising plant, and associated processes at premises at 851 Great South Road, Otahuhu.

[2] Consent was granted by the Regional Council on 5 August 1998, subject to standard and special conditions, for a term to expire on 31 July 2008. The appellants lodged an objection against the term of the consent, seeking a term of 35 years



instead. Following a hearing, by decision given on 29 October 1999 the objection was disallowed.

[3] By this appeal, the appellants again sought that the consent be amended to provide a term of 35 years. That was resisted by the Regional Council.

[4] As the term of the consent is the only issue in the appeal, we will consider the relevant provisions of the Act and the decisions that might bear on their application, to derive from them a basis for deciding the issue. We could then deal with the arguments based on the circumstances of the case.

Provisions of the Resource Management Act

[5] First there is the stated purpose of the Act—

5. Purpose— (1) The purpose of this Act is to promote the sustainable management of natural and physical resources.

(2) In this Act, "sustainable management" means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety while—

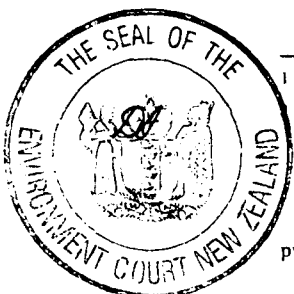
(a) Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and

(b) Safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and

(c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment.

[6] An application for a resource consent to discharge contaminants to air, like all resource consent applications, is required to include an assessment of any actual or potential effects that the activity may have on the environment, and the ways in which any adverse effects may be mitigated.¹ The assessment is to be in such detail as corresponds with the scale and significance of the actual and potential effects that the activity may have on the environment.²

[7] In considering a resource consent application, a consent authority is required to have regard to any actual or potential effects on the environment of allowing the activity, to any relevant regional policy statement, and any relevant objectives,



¹ Resource Management Act 1991, s 88(4)(b).
² Resource Management Act 1991, s 88(6)(a).

policies, rules or other provisions of a plan or proposed plan.³ There is specific provision in section 104(3) in respect of applications for discharge permits⁴–

(3) Where an application is for a discharge permit or coastal permit to do something that would otherwise contravene section 15 or 15B (relating to discharge of contaminants), the consent authority shall, in having regard to the actual and potential effects on the environment of allowing the activity, have regard to –

(a) The nature of the discharge and the sensitivity of the proposed receiving environment to adverse effects and the applicant's reasons for making the proposed choice; and

(b) Any possible alternative methods of discharge, including discharge into any other receiving environment.

[8] A consent authority has a discretion conferred by section 105(1) to grant or refuse a resource consent for a discharge of contaminants to air, having regard to the relevant matters referred to in section 104. If consent is granted, the consent authority has power to impose conditions. The term ‘conditions’ is given a broad meaning⁵–

“Conditions”, in relation to plans and resource consents, includes terms, standards, restrictions and prohibitions:

[9] The imposition of conditions on resource consents is governed by section 108, of which we quote relevant content⁶–

108. Conditions of resource consents– (1) Except as expressly provided in this section and subject to any regulations, a resource consent may be granted on any condition that the consent authority considers appropriate, including any condition of a kind referred to in subsection (2).

(2) A resource consent may include any one or more of the following conditions:

... (e) Subject to subsection (8), in respect of a discharge permit or a coastal permit to do something that would otherwise contravene section 15 (relating to the discharge of contaminants) or section 15B, a condition requiring the holder to adopt the best practicable option to prevent or minimise any actual or likely adverse effect on the environment of the discharge and other discharges (if any) made by the person from the same site or source:

... (3) A consent authority may include as a condition of a resource consent a requirement that the holder of a resource consent supply to the consent authority information relating to the exercise of the resource consent.

(4) Without limiting subsection (3), a condition made under that subsection may require the holder of the resource consent to do one or more of the following:

(a) To make and record measurements:

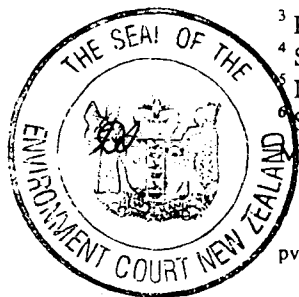
(b) To take and supply samples:

³ Resource Management Act 1991, s 104(1).

⁴ S 104(3) as amended by s 21(1) Resource Management Amendment Act 1997.

Definition of ‘conditions’ in s 2(1).

⁶ S 108 as amended by s 58(6) Resource Management Amendment Act 1993 and by s 24 the Resource Management Amendment Act 1997.



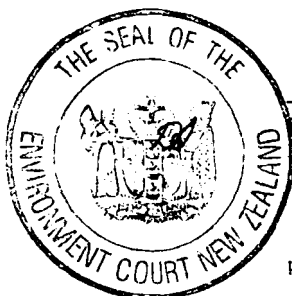
- (c) To carry out analyses, surveys, investigations, inspections, or other specified tests:
 - (d) To carry out measurements, samples, analyses, surveys, investigations, inspections, or other specified tests in a specified manner:
 - (e) To provide information to the consent authority at a specified time or times:
 - (f) To provide information to the consent authority in a specified manner:
 - (g) To comply with the condition at the holder of the resource consent's expense.
-
- (8) Before deciding to grant a discharge permit or a coastal permit to do something that would otherwise contravene section 15 (relating to the discharge of contaminants) or 15B subject to a condition described in subsection (2)(e), the consent authority shall be satisfied that, in the particular circumstances and having regard to -
- (a) The nature of the discharge and the receiving environment; and
 - (b) Other alternatives, including any condition requiring the observance of minimum standards of quality of the receiving environment - the inclusion of that condition is the most efficient and effective means of preventing or minimising any actual or likely adverse effect on the environment.
- ...

[10] Section 123 does bear on the terms of resource consents. We quote it in full—

- 123. Duration of consent—** Except as provided in section 125,—
- (a) The period for which a coastal permit for a reclamation, or a land use consent in respect of a reclamation that would otherwise contravene section 13, is granted is unlimited, unless otherwise specified in the consent:
 - (b) Subject to paragraph (c), the period for which any other land use consent, or a subdivision consent, is granted is unlimited, unless otherwise specified in the consent:
 - (c) The period for which any other coastal permit, or any other land use consent to do something that would otherwise contravene section 13, is granted is such period, not exceeding 35 years, as is specified in the consent and if no such period is specified, is 5 years from the date of commencement of the consent under section 116:
 - (d) The period for which any other resource consent is granted is the period (not exceeding 35 years from the date of granting) specified in the consent and, if no such period is specified, is 5 years from the date of commencement of the consent under section 116.

[11] We were also referred to the power of a consent authority to review conditions of a resource consent. That power is conferred by section 128⁷—

- 128. Circumstances when consent conditions can be reviewed—** (1) A consent authority may, in accordance with section 129, serve notice on a consent holder of its intention to review the conditions of a resource consent—
- (a) At any time or times specified for that purpose in the consent for any of the following purposes:
 - (i) To deal with any adverse effect on the environment which may arise from the exercise of the consent and which it is appropriate to deal with at a later stage; or
 - (ii) To require a holder of a discharge permit or a coastal permit to do something that would otherwise contravene section 15 or 15B to adopt the best practicable option to remove or reduce any adverse effect on the environment; or



As amended by s 73 the Resource Management Amendment Act 1993, and by s 30 the Resource Management Amendment Act 1997.

- (iii) For any other purpose specified in the consent; or
- (b) In the case of a water, coastal, or discharge permit, when a regional plan has been made operative which sets rules relating to a maximum or minimum levels or flows or rates of use of water, or minimum standards of water quality or air quality, or ranges of temperature or pressure of geothermal water, and in the regional council's opinion it is appropriate to review the conditions of the permit in order to enable the levels, flows, rates, or standards set by the rule to be met; or
- (c) If the information made available to the consent authority by the applicant for the consent for the purposes of the application contained inaccuracies which materially influenced the decision made on the application and the effects of the exercise of the consent are such that it is necessary to apply more appropriate conditions.

...

[12] The exercise of the power of review is governed by section 131⁸–

131. Matters to be considered in review– (1) When reviewing the conditions of a resource consent, the consent authority or hearing committee set up under section 117 in respect of a permit for a restricted coastal activity–

(a) Shall have regard to the matters in section 104 and to whether the activity allowed by the consent will continue to be viable after the change; and

(b) May have regard to the manner in which the consent has been used.

(2) Before changing the conditions of a discharge permit or a coastal permit to do something that would otherwise contravene section 15 (relating to the discharge of contaminants) or 15B to include a condition requiring the holder to adopt the best practicable option to remove or reduce any adverse effect on the environment, the consent authority shall be satisfied, in the particular circumstances and having regard to–

(a) The nature of the discharge and the receiving environment; and

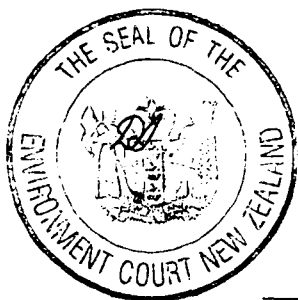
(b) The financial implications for the applicant of including that condition; and

(c) Other alternatives, including a condition requiring the observance of minimum standards of quality of the receiving environment–

that including that condition is the most efficient and effective means of removing or reducing that adverse effect.

Decisions about terms of consent

[13] We have identified the provisions of the Act that might be relevant. We were not referred to any decision of a superior Court on the interpretation or application of those provisions with reference to the term of a resource consent, and we are not aware of any. We now consider decisions of the Planning Tribunal and the Environment Court about the terms of resource consents.



⁸ As amended by s 31 the Resource Management Amendment Act 1997.

[14] In *Medical Officer of Health v Canterbury Regional Council*⁹ the Planning Tribunal considered the term of a grant of a resource consent for discharge to air of contaminants from an existing fertiliser works, the appellant contending that it should be restricted to a period of five years. The Tribunal referred to the Regional Council's power of review, and to section 108(8). Of the appellant's proposal that the term be limited to five years, the Tribunal said that the provision allowing for annual reviews by the Council¹⁰ –

... is a very much tighter supervision of the operation by the applicant of the resource consent than the proposal made by him that the term of the grant be for only five years.

[15] And of the provisions for review of conditions¹¹ –

... is in our view a mechanism by which a consent authority can ensure that conditions imposed on a resource consent do not become outdated, irrelevant or inadequate.

... Indeed they provide a more rigorous and effective mechanism for ensuring that the applicant company does not adversely affect the air quality of the area surrounding its factory and provides a more efficacious procedure than the somewhat blunt instrument suggested by the Medical Officer of Health, that the term of this resource consent be limited to five years to enable these matters to be looked at afresh after that time. We can see no grounds for the appellant's pessimism concerning the integrity of this process. We must, and do assume that the regional council will do its duty according to law in enforcing and monitoring these discharges.

[16] *Mangakahia Maori Komiti v Northland Regional Council*¹² concerned contested applications for resource consent to abstract water from a river. One member of the Tribunal was satisfied that a ten-year term could be granted, and the majority preferred a six-year term, with the possibility of a review of conditions after three years. The reasoning is expressed in these passages from the decision¹³ –

The majority are satisfied that for the proposed 6-year period of the present grants of consent the nature and quality of the river will be duly and properly maintained and safeguarded; further, that by granting consent for such period on the conditions imposed, due recognition and provision will be made for all relevant paragraphs of s 6; that particular regard will be had to the various paragraphs of s 7; and that the principles prima facie the Treaty will be appropriately taken into account. In particular, they are satisfied that the river, as a fishing resource, will not be adversely affected in any significant way. Unlike Mr Fitzmaurice [the dissenting Commissioner] however, they are not utterly confident in the view that

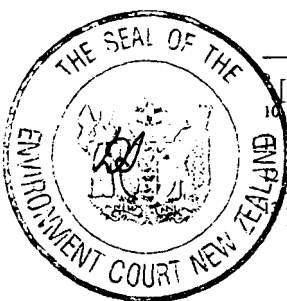
[1995] NZRMA 49.

⁹ Pg 56.

¹⁰ Pg 63.

Planning Tribunal Decision A107/95.

¹¹ Pg 47.



all this would be the case if the consent period were of the order or ten years. The case is one, in their opinion, where a "fresh look" is warranted rather sooner, remembering always the river's central importance and status in the eyes of the tangata whenua and weighing all the experts' opinions against the background of present day data and other information.

[17] In *Hebberd v Marlborough District Council*¹⁴ the Planning Tribunal considered the term of a resource consent for a marine farm¹⁵–

We consider the Council is wise to be cautious in its approach to the long term effects of the grant of marine farm licences. The Council's evidence indicated that of the approximately 500 marine farms in the Marlborough Sounds, 9 are in this particular bay. As Mr Dwyer submitted the protection of amenity values in the Sounds has considerable economic potential in itself as a basis for substantial tourist, holiday maker and permanent resident population. Most of the marine farms in this area were licensed under previous legislation. Mr Wagg told us that farming as such had ceased in the Bay, and land use was tending to recreational forest development through planting and regeneration of native bush. He believed further subdivision of present holdings was possible with further housing; and that occupation in the Bay may intensify. It is in an "Area of Outstanding Landscape Value". We are therefore mindful that use of this Bay may ... change within the planning period.

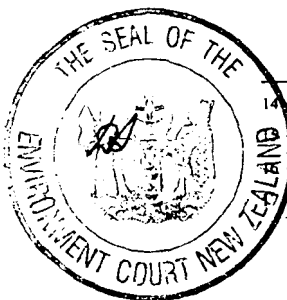
...
Under the circumstances we will remain consistent with our approach on other provisions of the proposed Plan, and grant a term of 20 years in keeping with the provisions as they currently stand.

[11] *Prime Range Meats v Southland Regional Council*¹⁶ concerned the term of consent to discharge to air of contaminants from an existing meatworks. Consent had been granted by the Regional Council for a term of five years, and the appellant sought a term of ten years. Condition 4 stipulated–

[a] *There shall be no odour of a noxious, offensive or objectionable nature, or any nuisance effect, beyond the boundary of the site attributable to gaseous emissions further the consent holder's premises.*

[12] The consent also contained a condition providing for review, of which the Court said¹⁷–

We have difficulty in accepting that review under section 128 would be an adequate solution for a number of reasons. First review is triggered by the Regional Council as consent authority and so the residents who would be affected may not feel that the solution is in their control. Secondly and more importantly there would be a tendency to approach the problem (non-compliance with condition 4) on the basis that the answer is to put up a condition with which it is easier for PRM [the applicant] to comply while not necessarily improving the amenities for residential neighbours. We cannot see that leaving the smell issue to be dealt with by



¹⁴ Planning Tribunal Decision W36/96.
¹⁵ Ibid. p 9.
¹⁶ Environment Court Decision C127/98.
¹⁷ Paragraph 17.

reviewing condition 4 "at a later stage" is appropriate at all. Both sides would be back to square one at that stage.

We do not overlook that the Regional Council has specific power in relation to a discharge permit on a review to require PRM to "reduce any adverse effect on the environment". However that has less ameliorating power than a fresh application which may be declined. A discharge permit that expires in five years would concentrate PRM's corporate mind.

...

[18] The Court listed the matters that it took into account as being–

- (a) the past record of PRM and its predecessors;*
- (b) the concern of the residents that they will have to put up with a nuisance for ten years rather than five. In other words there was scepticism that condition 4 would be met.*
- (c) the relatively low capital expenditure by PRM as opposed to the expenditure on repairs and maintenance or for profit.*
- (d) the uncertainty of condition 4.*
- (e) that technological advances may lead to more definite ways of measuring and/or reducing odours.*

[19] The Court's conclusion is stated in this passage¹⁸–

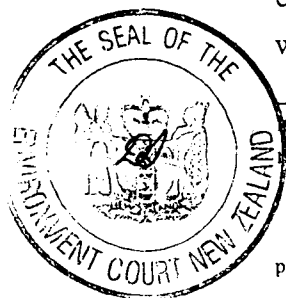
... the one aspect of the case that concerns us more than any other is the uncertainty of the Regional Council's conditions 4. We consider that outweighs the uncertainty of PRM only having a discharge permit for five years. At that stage – if the company has continued to repair and maintain, completed and operated the new anaerobic pond and completed the hookup of various sources of odour to the biofilter – we trust that either new technology allowing objective measurement of odour or some more thought about the appropriate condition to replace condition 4 will enable a more satisfactory solution than the existing condition. Accordingly it appears to us that the most appropriate solution is to confirm the Regional Council decision as to term of the consent being restricted to five years.

[20] In *Bright Wood v Southland Regional Council*¹⁹ the issue was the terms of resource consents for discharge of contaminants to air from a timber processing operation, and for discharge of treated stormwater from that operation into a river. Both consents had been granted for 15 years and the appellant sought 25 years.

[21] The consents contained review conditions, although the Court was critical of the way in which those conditions were expressed.

[22] The Court distinguished *Prime Range Meats*, as being a case in which there had been considerably more public disquiet over operation of the factory. It expressed a concern about toxic metals being flushed into the river and finding their way into the surrounding environment, and considered that in 15 years that issue

Paragraph 21.
Environment Court Decision C143/99.



should be revisited, as techniques might have been developed by then which would enable complete containment of those pollutants.

[23] The Court concluded that it would be appropriate to give different terms for the two resource consents: 25 years for the discharge to air, and 15 years for the discharge to water. Of the discharge to air, the Court said²⁰–

If there are adverse effects from that discharge the review conditions should, as Mr Chapman submitted, be adequate to avoid or remedy them. To protect its investments on the site, Bright Wood is entitled to as much security of term as is consistent with sustainable management.

[24] Finally, we were referred to *Aviation Activities v MacKenzie District Council*²¹ concerning a tourist helicopter operation. The Court found that the risks of accident were very slight, and noise effects would be minor, but limited the consent to 10 years so that in future the appropriateness of the site could be determined in the light of development of Tekapo at that time. The Court's reasoning is stated in this passage from the decision²²–

A method which we think can usefully and fairly be employed here to encourage helicopter activities to establish (ultimately) at the Tekapo Airport would be to grant a resource consent that is limited in duration. Normally granting a land use consent that is so limited may constrain investment on the land. However, here there is v little development (no building) on the site, so a 10 year consent period may still prove useful for AA [the applicant]. Limiting the resource consent in that way would enable a termination of the resource consent if circumstances changed. For example, if the township develops towards the site, then there will be an opportunity for new residents to oppose any new resource consent when this one expires (if granted).

Basis for deciding terms of consent

[25] We draw from the provisions of the Act the indications about the terms of resource consents for discharges of contaminants to air set out in paragraphs [28] to [30].

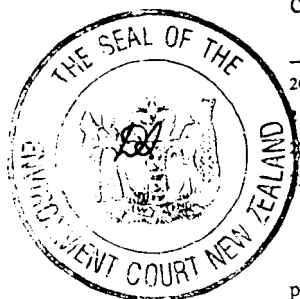
[26] The consent authority has power to grant such a resource consent for any term not exceeding 35 years from the date of granting that it considers appropriate, but if no term is specified, the term of the resource consent is 5 years from commencement.²³

²⁰ Paragraph 10.

²¹ Environment Court Decision C72/2000.

²² Paragraph 51

²³ Resource Management Act 1991, s 123(d).



[27] A decision on what is the appropriate term of the resource consent is to be made for the purpose of the Act,²⁴ having regard to the actual and potential effects on the environment and relevant provisions of applicable instruments under the Act,²⁵ the nature of the discharge, the sensitivity of the receiving environment to adverse effects, the applicant's reasons, and any possible alternative methods of discharge, including to another receiving environment.²⁶

[28] Relevant factors in making a decision on the term of the resource consent include that conditions may be imposed requiring adoption of the best practicable option,²⁷ requiring supply of information relating to the exercise of the consent,²⁸ requiring observance of minimum standards of quality in the receiving environment,²⁹ and reserving power to review the conditions.³⁰

[29] We also draw from the decisions reviewed the indications about the terms of resource consents for discharges of contaminants to air summarised in paragraphs [30] and [31].

[30] Uncertainty for an applicant of a short term, and an applicant's need (to protect investment) for as much security as is consistent with sustainable management, indicate a longer term.³¹ Likewise, review of conditions may be more effective than a shorter term to ensure conditions do not become outdated, irrelevant or inadequate.³²

[31] By comparison, expected future change in the vicinity has been regarded as indicating a shorter term.³³ Another indication of a shorter term is uncertainty about the effectiveness of conditions to protect the environment (including where the applicant's past record of being unresponsive to effects on the environment and making relatively low capital expenditure on alleviation of environmental effects



²⁴ Ibid, s 5.

²⁵ Ibid, s 104(1).

²⁶ Ibid, s 104(3).

²⁷ Ibid, s 108(2)(e).

²⁸ Ibid, s 108(3) and (4).

²⁹ Ibid, s 108(8).

³⁰ Ibid, s 128(1).

³¹ *Prime Range Meats v Southland Regional Council* C127/98; *Bright Wood v Southland Regional Council* C 143/99.

³² *Medical Officer of Health v Canterbury Regional Council* [1995] NZRMA 49.

³³ *Hebberd v Marlborough District Council* W36/96; *Aviation Activities v Macakenzie District Council* W72/2000.

compared with expenditure on repairs and maintenance or for profit).³⁴ In addition, where the operation has given rise to considerable public disquiet, review of conditions may not be adequate, as it cannot be initiated by affected residents.³⁵

[32] The Regional Council submitted that an activity that generates known and minor effects on the environment on a constant basis could generally be granted consent for a longer term, but that one which generates fluctuating or variable effects, or which depends on human intervention or management for maintaining satisfactory performance, or relies on standards that have altered in the past and may be expected to change again in future should generally be granted for a shorter term. We accept that in general those propositions might influence decisions on the term of discharge consents.

[33] On review conditions, the Regional Council submitted that they may be used in conjunction with longer terms where review is capable of addressing all issues of concern, but not where a consent-holder's financial viability might constrain controls intended to avoid, remedy or mitigate significant adverse effects on the environment.

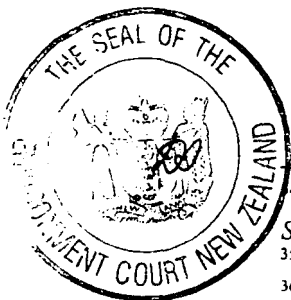
[34] We accept that. It emphasises the value of careful identification of risk, and selection of a safeguard that is tailored to respond to the nature of the risk identified.

The case in question

[35] We have identified what we understand to be the relevant statutory provisions and the factors that have been adopted in previous decisions in respect of the term of discharge permits. Now we outline the circumstances of the case before us.

[36] The Auckland regional policy statement contains a policy that adequate separation distances are to be maintained between industrial premises that have potential to discharge noxious, offensive or objectionable contaminants to air and adjacent land uses.³⁶ The explanation of the policy states—

Good pollution control and sound practice is not an adequate substitute for buffer distances to segregate noxious and offensive industry from other sensitive land uses.



³⁴ *Mangakahia Maori Komiti v Northland Regional Council A107/95; Prime Range Meats v Southland Regional Council C127/98.*

³⁵ *Prime Range Meats v Southland Regional Council C127/98.*

³⁶ Policy 10.4.7.4.

[37] Ms J L Metcalfe, a Regional Council senior air quality officer, gave the opinion that if the surrounding land use does become more sensitive, it is likely that the buffer distance between the plant and surrounding land uses will not be adequate to prevent adverse effects.

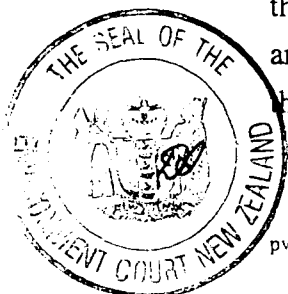
[38] Under the Auckland City Council's district plan, the appellants' plants are located in a Business 5 zone, and are permitted activities in that zone. The site is bounded to the west by the Otahuhu railway marshalling yards and to the south by Portage Road. Great South Road runs alongside fields on the eastern boundary, beyond which is the Mount Richmond Domain and land zoned Business 4. The property to the north (zoned Business 5) is used for freight marshalling. The rendering plant is 60 metres from its nearest boundary, and the nearest downwind neighbour is over 700 metres distant. The nearest neighbour is 150 metres from the plant, and the nearest residential properties are about 300 metres to the east of the site.

[39] The Business 4 zone is intended for a wide range of medium intensity business activity, mainly office, service and light industry. 'Heavy' and 'noxious' industries are discouraged. Activities that are permitted include care centres, educational facilities, entertainment facilities, garden centres and retail facilities.

[40] The Business 5 zone is intended for activities that are unable to locate in mixed business zones because of amenity constraints. It is a zone in which amenity levels such as noise, dust and odour will be considerably lower than in the Business 1 to 4 zones. Sensitive land uses are discretionary there. It is an appropriate zone for the appellants' activities.

[41] Ms Metcalfe's opinion about the buffer appears to question the appropriateness of the Business 5 zoning of the site in juxtaposition with the Business 4 zoning of land to the east of Great South Road. It is our understanding that the zoning of those pieces of land in the district plan are now beyond challenge in this Court, and that this appeal about the term of the discharge permit does not provide an opportunity to review that zoning.

[42] Mr A von Tunzelman, General Manager of PVL Proteins Limited, explained that Auckland Meat Processors Limited slaughters and processes cattle, sheep, pigs and goats for consumption on the domestic market. He testified that about 90% of the meat consumed in Auckland, and in excess of 75% of all North Island domestic



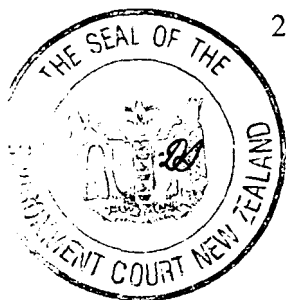
meat is supplied from this site. The other appellant, PVL Proteins Limited, recycles animal byproducts (largely from the abattoir) into meat and bone meal, tallow and dried blood for local and export markets.

[43] Mr von Tunzelman deposed that since it purchased the operation in 1993, PVL Proteins Limited had at its own initiative carried out significant environmental improvements to the plant at a cost of \$2.5 million. It had also made improvements in the environmental procedures at the plant, and had obtained ISO 9002 and ISO 14001 accreditation for its operation, which provides additional assurance, through 6-monthly audits, that its environmental obligations are being met.

[44] The witness also testified that there had been a small number of complaints about the activity, and that all had been responded to by alterations to systems and procedures. Plant breakdowns had been eliminated by duplication of machinery and constant availability on site of tradesmen and spare parts. For the present application the appellants had obtained the consents of all persons considered by the Regional Council as potentially affected, and as a result the application had been processed without public notification.

[45] Ms Metcalfe deposed that since 1991 the Council had received 40 complaints relating to odour from the site, nine in 2000. However she acknowledged that the company has consistently improved odour control over the past ten years. Ms Metcalfe testified that Regional Council enforcement officers had detected odour from beyond the boundary of the site on six occasions in 2000, and that the odour was considered to be offensive and objectionable on three of those occasions. Those emissions were attributed to fumes escaping when a door is opened, and to storage of effluent at the abattoir. In cross-examination she agreed that the plants had a “good track record”.

[46] Mr von Tunzelman observed that the cost of the high expense on environmental protection placed PVL Proteins at a disadvantage in relation to other rendering plants the operators of which had been required to spend little or nothing on environmental improvements, yet had been granted considerably longer terms of consent. He named two rendering plants that had been granted consents for 20 and 25 years respectively.



[47] The witness testified that the applicants wish in future to replace much of the existing plant in a new building specifically designed to meet existing and future needs, using knowledge gained in the past years, but required the security of a longer term than 10 years to warrant the expenditure.

[48] In cross-examination, Mr von Tunzelman agreed that the most significant improvements to the plant had been made while the company had resource consent for only 5 years. However he confirmed that if the consent for the plant had a longer term, the directors would be keen to rebuild the “envelope”, though he acknowledged that there is no firm commitment to rebuilding.

[49] The witness also agreed that the smell from the rendering plant could be offensive if it escaped; and that the performance of staff is critical.

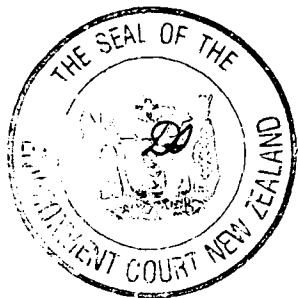
[50] The appellants also called Dr T J Brady, a consultant chemist specialising in air pollution control, with considerable experience of abattoirs and rendering plants. He produced a substantial report of his assessment of discharges to air from the abattoir and rendering plant.

[51] Dr Brady deposed that the best practicable option had been adopted for minimising emissions from the plant by incineration of fumes from cookers and dryers, complete sealing of the processing building, changing the air 20 times per hour and venting through two large biofilters, and duplication of all key pieces of equipment and odour control systems. The witness gave the opinion that there is no engineering reason that the current high level of performance will not continue for the indefinite future, and that it is unlikely that there will be any changes in technology in the foreseeable future that would improve on what is already in place.

[52] Dr Brady also referred to Conditions 3 and 4 of the discharge permit–

That beyond the boundary of the site there shall be no odour caused by discharges from the site which, in the opinion of an enforcement officer, is noxious, offensive or objectionable.

That the consent holder shall at all times operate, maintain, supervise, monitor and control all processes on site so that emissions authorised by this consent are maintained at the minimum practicable level ...



[53] In cross-examination, Dr Brady agreed that the contribution by the staff is an important component, and that with the best technology, the appellants could not prevent odour being discharged accidentally. He deposed that its good performance results from a mixture of technology and management.

[54] Mr K C Mahon, the Regional Council's Air Quality Manager, deposed that the rendering industry is subject to regular change through innovative technological advances, so that the best practicable option changes frequently. He referred to changes over the last decade in process method, in fuel, and in air pollution control technologies.

[55] Of PVL Proteins' plant, Mr Mahon testified that it is one of the best controlled rendering operations in New Zealand, but it is still subject to breakdowns, depends on strict management to control fugitive emissions, and is a significant cause of complaint. In cross-examination he agreed that the afterburners are well designed, and that the biofilters are operating successfully with what they are dealing with. He also agreed that duplication of the lines is a significant risk-reduction method.

[56] The discharge permit also contains a review condition, which we quote—

That the Group Manager may review the conditions of this consent in December 1998, and every year thereafter in order:

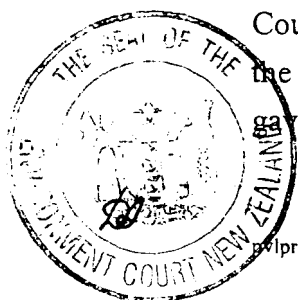
a. to deal with any significant effect on the environment arising from the exercise of this consent which was not foreseen at the time the application was considered and which it is appropriate to deal with at the time of the review.

b. to consider the adequacy of the conditions which prevent nuisance beyond the boundary of the premises, particularly if regular or frequent complaints have been received and validated by an enforcement officer.

c. to consider developments in control technology and management practices that would enable practicable reductions in the discharge of contaminants.

[57] Mr Mahon testified that the Regional Council almost always imposes review conditions, and also monitoring conditions. He confirmed that PVL Proteins employs an odour monitor, and that the Regional Council has access to the monitor's reports.

[58] Mr Mahon deposed that the ability to review conditions had led the Regional Council to use longer terms. However he acknowledged the important place, under the Resource Management Act, of opportunities for public participation. Mr Mahon gave the opinion that, in cases such as PVL Proteins, where there are potential



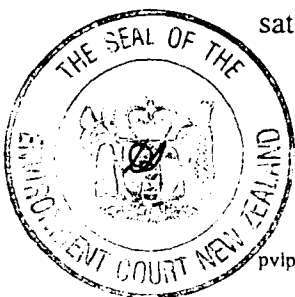
adverse effects, and the neighbourhood could change significantly over 10 years, it would be irresponsible to exclude the public by relying entirely on review provisions. The witness also doubted that it would be practical to deal with PVL Proteins' rendering plant under those provisions, because a consent renewal process would typically involve an independent expert, and requirement for further information, neither of which could be required in a review process.

[59] In cross-examination Mr Mahon explained that he was referring to an independent expert to prepare an assessment of environmental effects to be included with a resource consent application. He confirmed that on a review of conditions the nature of the process would not have changed, and that the Regional Council would have monitoring information and rights of inspection.

[60] Ms Metcalfe cited a number of reasons that caused her to believe that review would not deal with changes in effects or technology. The first was that there is not provision for public input into the initiation of a review (other than informal request). The second was that a review does not generate an assessment of environmental effects. The third was that in proposed changes to conditions the onus of proof is on the consent authority. Fourthly that to initiate a review to address adverse effects, the effects have to be demonstrated by the consent authority, while a consent renewal provides incentive and opportunity for effects to be identified by the applicant at its expense. Fifthly, a review may not result in termination of a consent (except in limited circumstances). The sixth reason was that on review the consent authority has to consider whether the activity would continue to be viable after the change, which impliedly limits the amendment to conditions for protection of the environment.

[61] In cross-examination about the first reason, Ms Metcalfe acknowledged that the review condition expressly requires the official to have regard to complaints, and confirmed that complaints to the Regional Council are formally recorded.

[62] On the second reason, Ms Metcalfe agreed that the conditions of the permit require monitoring and logging of data, and provision of it to the Regional Council. They also permit routine inspection, and forbid changes in process. The witness agreed that commissioning a community survey as part of a review process may satisfy her concern in that respect.



[63] On the third reason, Ms Metcalfe was unable to say that her concern about onus of proof was based on legal advice. On the fourth, she agreed that the monitoring conditions call for monitoring to be carried out at the consent-holder's expense.

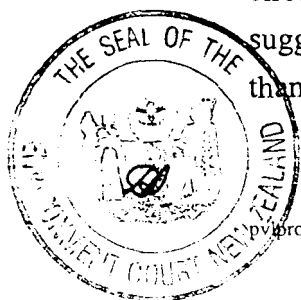
[64] The appellants claimed that a 10-year term, rather than a 35-year term, may result in a significant loss (up to 30%) in the value of the company, and would affect its ability to raise capital in both the equity and the debt markets. They called Mr B V Walsh, a financial consultant, who gave his opinions to that effect.

[65] In cross-examination, Mr Walsh agreed that the loss would be difficult to quantify, and stated that the value of private companies is "very much an art form". He was not aware of the review provisions in the discharge permit, and agreed that a prudent company analyst would take into account the regulatory authority's view of the company's performance.

[66] Mr Mahon deposed that the Regional Council had considered capital investment as one component of its term decision-making for very large investments in the order of hundreds of millions of dollars. Ms Metcalfe gave the opinion that the economic impact on the applicant is not a matter that can sensibly be considered by a consent authority for the purposes of fixing a term of consent. She acknowledged that depreciation of process equipment may be taken into account in setting a consent term for new plants involving considerable capital equipment.

[67] We are not persuaded that a relevant distinction can be made between terms for discharges from existing plant and from new plant; nor between those from plant that involved very large capital investment and those to which less (but still considerable) expenditure was committed. In our opinion in the context of a statutory purpose that includes (among other things) enabling people to provide for their economic well-being, the economic effects on the consent-holder of a particular consent term is a relevant factor, to be considered along with all others.

[68] We accept that a shorter term rather than a longer term might affect to a small degree the value of a company and its ability to raise capital. However we are not persuaded that would-be investors who made diligent enquiries about the circumstances of the appellants would devalue those companies to the extent suggested on account of the term of the air discharge permit being 10 years rather than a longer period that might realistically be expected by them.



Consideration

[69] We now apply to the circumstances of the case the factors that we drew from the Act and the decisions and submissions as relevant considerations for deciding the term of a discharge permit.

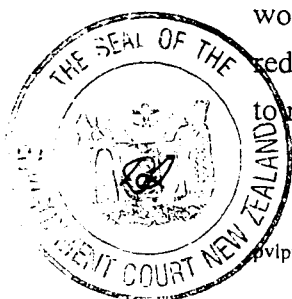
[70] We find that the appellants' plants perform essential functions, are well equipped, and commendably managed. There was no suggestion that they could be operated without any discharge of contaminants to air, or that an alternative method of discharge would be superior. Even so there is some chance of risk of human error allowing escape of objectionable odours. In addition future changes of management might lead to a relaxation of the present standards and practice. There is a risk of potential adverse effects on the environment.

[71] The nature of the potential emissions is that they are likely to be objectionable. However they are also capable of being stopped quite quickly, so they are likely to be transitory.

[72] Of the planning instruments under the Act, the regional policy statement calls for a buffer to segregate noxious and offensive industry from sensitive land uses. The district plan uses zoning as a technique for that purpose. The zoning of the site and other land in the vicinity is now beyond challenge, and the site is appropriately zoned for the appellants' activities. Acknowledging that unpleasant odours can be perceived at some considerable distance in some climatic conditions, the nearest area likely to be affected is a mixed business zone, and the nearest residential property is about 300 metres away.

[73] We find that the plants employ what are currently the best practicable options, and the consent contains conditions requiring no objectionable odour beyond the site, minimum practicable level of emissions, supply of monitoring data on the exercise of the consent, and power to review the conditions. This is not a case where the consent-holders' financial ability might constrain compliance with them.

[74] We accept that the shorter the term, the greater the adverse economic effect on the consent-holders, even though we have not been persuaded that the effect would be as great as the appellants contended. A longer term would encourage the redevelopment of the building envelope for the rendering plant, which has potential to reduce even further the risk of fugitive emissions of objectionable odour.



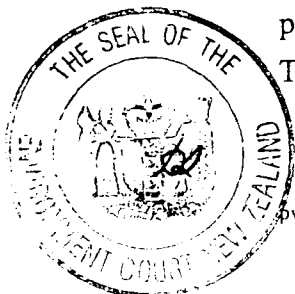
[75] Although predicting the future in a dynamic part of New Zealand cannot be reliable, we have no basis for supposing that there will be significant change in the sensitivity to odour of the kind of activities carried on in the vicinity of the site during the next decade or two. The relevant zoning provisions of the district plan have only recently become operative, and we were not made aware of any economic forces calculated to result in adverse changes.

[76] Nor is there any basis for uncertainty about the effectiveness of the conditions of consent. The appellants have shown, by substantial capital expenditure, a commitment to effects on the environment of odour emissions from their operations, and have been responsive to complaints.

[77] We accept that there is a chance that technological advances may lead to new methods of reducing objectionable discharges in the next decade or so. It is even possible that those advances may reduce further the vulnerability of rendering plants to escape of fugitive emissions due to accident or carelessness. The Regional Council has imposed a review condition, which the appellants have not challenged, that expressly contemplates consideration of amending conditions where developments in control technology and management practices would enable practicable reductions in the discharge of contaminants. We are not persuaded that the chance of such advances warrants a shorter rather than a longer term of the consent, when the consent authority has that power.

[78] The term of a consent, and the ability of a consent authority to review conditions of the consent, provide different safeguards. When the term of a consent expires, the question whether further consent should be granted is open. As the Regional Council pointed out, on an application for a further consent it is for the applicant to provide an assessment of actual or potential effects on the environment, and the ways in which any adverse effects may be mitigated. The application may be publicly notified, and if it is, members of the public may make submissions and be heard and give evidence on the application. The application may be granted or refused, and if it is granted, an entirely fresh set of conditions may be imposed if the consent authority considers appropriate.

[79] By comparison, exercise of a consent authority's power to review is limited to the circumstances described in section 128(1) and in the review condition. Public participation is not assured, but would be at the choice of the consent authority. There is no legal requirement that the consent-holder provide a fresh assessment of

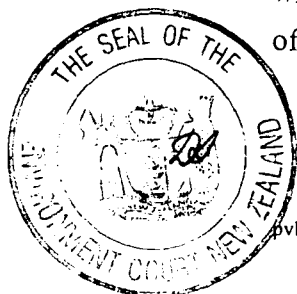


environmental effects or mitigation measures. The consent itself could not be terminated, and in changing the conditions the consent authority would have to have regard to whether the consent would continue to be viable after the change.

[80] In our experience, most of those points of difference are diminished in practice. A consent authority may well decide to exercise a power of review in response to complaints from the public of adverse effects from exercise of the consent. Its need to establish the existence of conditions in which the power of review may be exercised is part of its responsibilities as the regulatory authority, responsibilities that it cannot impose on the consent-holder. However, although not legally obliged to, to protect its interests a consent-holder is in practice likely to respond with an independent review of effects and mitigation measures. While the consent authority is required to have regard to continued viability of the consent after the conditions are changed, there is no other limit on the extent to which the conditions may be changed, save the consent authority's judgement of what is appropriate.

[81] On a fresh application following expiry of a consent, the consent authority may decide that the application does not need to be publicly notified. It is more likely to come to that conclusion if there is no history of public complaints about adverse environmental effects from exercise of the previous consent. In those circumstances too, the extent of an assessment of environmental effects and mitigation measures may be less detailed, corresponding to the scale and significance of the environmental effects. Although the consent authority may not be expressly required to have regard to the continued viability of the activity for which the consent is required, in practice the positive effects of a further grant, and the consequences of refusal, are bound to be considered.

[82] In our opinion, the existence of a review condition can properly influence a decision on the term of a discharge permit, but should not obscure the fundamental difference between the two. The consent authority's power of review is to consider changing the conditions of consent to make them more appropriate in the light of the circumstances triggering the review, and the consent-holder's response. The term of the consent is the duration or period for which it may be exercised, on the conditions applicable for the time being. The term implies that after expiry, the question whether consent is to be granted for a further term, or refused, would be the subject of fresh consideration.



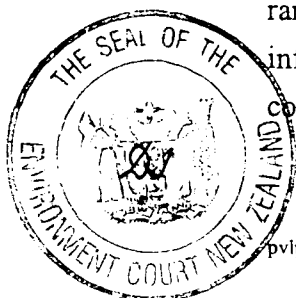
[83] In this case, there is no question that there should be a review condition. It has not been challenged by the appellants. What has to be decided is the length of the term of the consent, bearing in mind that it does contain a power of review.

[84] The main risk to be considered is that management of the plants will not continue to improve, so that the occasional accidental or careless emissions of objectionable odour are not eliminated. We do not downplay the potentially offensive nature of those emissions. However they have been relatively rare and transitory. Given the extent of the commitment shown by the appellants to minimising them, we consider that a shorter term of consent would not be the appropriate response. In our opinion that risk is more appropriately responded to by the power of review.

[85] The next main risk is a possible change in the receiving environment that cannot be foreseen now from the pattern of zoning. By definition we are not able reliably to predict what that change might be. However in our experience such unexpected changes take some years to develop. Bearing in mind the reasonable needs of the appellants for security for investment and future development, it is our judgment that a term as long as 15 years would be an adequate security for the community against change in the receiving environment.

[86] Then we consider that possibility of technological change that would make it inappropriate for the present processes to be continued. That is a question on which there was a difference between the opinions of Dr Brady and Mr Mahon. We accept that there is a possibility that over the next decade there will be developments in rendering process technology or in techniques for containment of odour. If so, the appellants may choose to adopt them of their own initiatives (perhaps encouraged by the regulatory authority). But if they do not do so, the question how long they should be allowed to continue with the present technology must depend mainly on the environmental effects of using it. It is not possible now to make a comparison of those effects with the environmental effects of using the hypothetical new technology.

[87] The appellants' present technology is currently the best practicable option. Their considerable investment in it, the location in an appropriate zone, the relatively rare and transitory environmental effects, and the ability to review the conditions, influence our judgement of the duration for which they should have security of consent before having to make a fresh application in the light of circumstances that



may or may not by then have changed. It is our judgment that the possibility of new technology does not indicate a need for a term as short as ten years.

[88] We have not overlooked the evidence of both parties about terms of consents for other discharge permits for rendering plants and other processing activities. We also accept Mr von Tunzelman's point that a shorter term for the appellants gives their competitors a business advantage. We also accept that the respondent has made real efforts to establish a rational pattern of terms for various discharge permits.

[89] However we do not know all the relevant circumstances of the other operations. It may be that the rendering plants cited are not located in urban areas at all. It may be that if we were deciding the term of those consents, we might have fixed shorter terms than they have been granted. We can only make a judgement on the case before us.

Determination

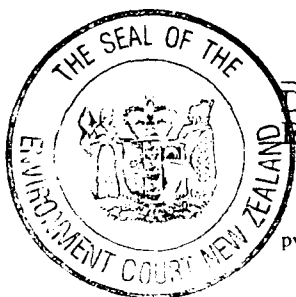
[90] Having considered those aspects of the question, standing back and considering the question more broadly, we have been persuaded that consistent with the statutory purpose of sustainable management, the consent can properly be granted for a longer term than ten years, that the term of 35 years sought by the appellants would be too long, and that an appropriate term would be 14 years.

[91] Accordingly, the appeal is allowed to the extent only that the respondent's decision is amended by deleting the expiry date of 31 July 2008 and substituting an expiry date of 31 July 2012.

[92] The question of costs is reserved. If agreement cannot be reached, memoranda may be lodged.

DATED at AUCKLAND this *30* day of *July* 2001.

For the Court:



[Signature]
D F G Sheppard
Environment Judge

Te Rangatiratanga o Ngati Rangitahi Inc v Bay of Plenty Regional Council

High Court, Tauranga (CIV-2010-470-936)

9 December:

Wylie J

16 December 2010

Resource management — Consents — Effects — Adverse environmental effects — Environmental impact — Discharge — Water — Appeal against confirmation of grant of 25-year consents to operators of Tasman Mill, Kawerau to take river water and discharge treated wastewater, stormwater and landfill leachate — Whether pulp mill and paper mill operations should have been considered separately — Whether “exceptional circumstances” finding justified — Joint application and treatment facilities dictated consideration — Finding of exceptional circumstances based on combined factors appropriate — Twenty five-year term appropriately balanced economic factors and need for continuous environmental progress — Resource Management Act 1991, ss 107, 107(2), 299.

Resource management — Consents — Type — Discharge — Water — Appeal — “Exceptional circumstances” — Appeal against confirmation of grant of 25-year consents to operators of Tasman Mill, Kawerau to take river water and discharge treated wastewater, stormwater and landfill leachate — Whether pulp mill and paper mill operations should have been considered separately — Whether “exceptional circumstances” finding justified — Joint application and treatment facilities dictated consideration — Finding of exceptional circumstances based on combined factors appropriate — Twenty five-year term appropriately balanced economic factors and need for continuous environmental progress — Resource Management Act 1991, ss 107, 107(2), 299.

Resource management — Procedure — Appeals — Question of law — Consent — Contracts — Discharge — Water — Appeal against confirmation of grant of 25-year consents to operators of Tasman Mill, Kawerau to take river water and discharge treated wastewater, stormwater and landfill leachate — Whether pulp mill and paper mill operations should have been considered separately — Whether “exceptional circumstances” finding justified — Joint application and treatment facilities dictated consideration — Finding of exceptional circumstances based on combined factors appropriate — Twenty five-year term appropriately balanced economic factors and need for continuous environmental progress — Resource Management Act 1991, ss 107, 107(2), 299.

Words and Phrases — “Exceptional circumstances”.

Carter Holt Harvey Ltd (“CHHL”) and Skog Tasman Ltd (“NSTL”) operated Waste and Water Services (“WWS”), a joint venture to manage water use and discharges from their pulp and paper operations at the Tasman Mill, Kawerau. The Tasman Mill required resource consent to take and use water from the Tarawera River and then to discharge treated wastewater, stormwater and landfill leachate back into it. It also required resource consent to discharge contaminants into the air. It first obtained

consents under the Resource Management Act 1991 (“the Act”) in 2003 for a 10-year term, but in 2009 CHHL and NSTL successfully sought further consents for a 25-year period. They contended that the \$60 million expense of a new recovery boiler made the extended term essential.

Messrs T and L Marr, and Te Rangatiratanga o Ngati Rangitahi Inc (“the Society”) appealed to the Environment Court. The Court considered the consents under Resource Management Act 1991, ss 104, 104D, 107, as the discharge of wastewater and stormwater was a non-complying activity and caused a conspicuous change in the colour and clarity of the Tarawera River. Accordingly, the Court could only grant the water consent sought if “exceptional circumstances” justified it in doing so under Resource Management Act 1991, s 107(2)(a). The Court noted the economic and social benefits of the Tasman Mill and the dislocating effect of its closure on the Bay of Plenty area. It observed that the change in river colour constituted a “more than minor” effect under s 104D(1)(a), but considered that WWS’s proposal was broadly consistent with the policies and objectives of the relevant planning instruments and appropriate conditions could address ongoing concerns. It concluded by a narrow margin that the economic significance of the Tasman Mill and process improvements in water clarity constituted “exceptional circumstances” justifying the consent and confirmed the 25-year term subject to agreed conditions. The discharge to air conditions were also approved.

This appeal to the High Court was first brought by a Mr Paterson as alleged successor to the Society but later taken over by the Society itself. Given the urgency introduced by the need to introduce the new boiler, the Society received leave to appeal out of time. The Society alleged that the Environment Court erred by: (i) not considering the effects from the NSTL paper mill separately from discharge from the CHHL pulp mill, and considering irrelevant factors such as the social and economic benefits of the NSTL mill when considering discharge from the CCHL mill; (ii) finding “exceptional circumstances” justifying consent under s 107(2)(a) of the Act and; (iii) confirming the 25-year consent term.

Held (1) the application for discharge was made by CHHL and NSTL jointly through WWS and stated that the applicants shared many onsite activities, as well as the wastewater and stormwater systems operated by WWS. Accordingly, the Environment Court was required to deal with the application on its terms, and nothing in the Act required the application to be split into its component parts. In fact the Court had considered the mills on an individual basis when assessing their employment levels and the potential economic effect of their closure. There was no evidence that the Court had erred in law or taken an irrelevant consideration into account. (paras 52-58)

(2) The existence of exceptional circumstances was a matter of fact requiring the Environment Court’s evaluation. Each of the relevant matters, when itemised, could be identified as a relatively unusual circumstance. There was nothing in the Act precluding its approach of setting out individual factors and determining that, while not individually exceptional, in combination they justified consent under s 107(2)(a). No error by the Court in making this factual evaluation had been established. (paras 71-77)

(3) The Environment Court had concluded that the estimated capital investment in the Tasman Mill of \$100 million over 10 years meant that a term significantly longer than the five to eight years sought by the Society was appropriate. It was only prepared to accept the appropriateness of a long-term consent if it was “intimately” linked to an ongoing reduction in river colour, moving toward an inconspicuous discharge at the date of termination. It had applied the correct legal test, putting in

place a lesser term than the statutory maximum that sufficed to provide the applicants with security for present and future investment and appropriately rigorous consent conditions. The possible consequence of a shorter term was the closure of the Tasman Mill, which was inconsistent with the purpose of s 5 of the Act. The 25-year term confirmed was appropriate and the appeal should be dismissed. (paras 85-97)

Cases referred to

- Countdown Properties (Northlands) Ltd v Dunedin City Council* (1994) 1B ELRNZ 150, [1994] NZRMA 145 (HC)
- Darroch v Whangarei District* PT Auckland Decision A18/93, 1 March 1993 (PT)
- Friends of Pakiri Beach v Auckland Regional Council* [2009] NZRMA 285 (HC)
- Genesis Power Ltd v Manawatu-Wanganui Regional Council* (2006) 12 ELRNZ 241, [2006] NZRMA 536 (HC)
- Meridian Energy Ltd v Wellington City Council* EnvC Wellington W031/07, 14 May 2007
- Motorimu Wind Farm Ltd v Palmerston North City Council* EnvC Wellington W067/08, 26 September 2008
- Ngati Rangi Trust v Genesis Power Ltd* (2009) 15 ELRNZ 164, [2009] NZRMA 312 (CA)
- Nicholls v Papakura District Court* [1998] NZRMA 233 (HC)
- Paokahu Trust v Gisborne District Council* EnvC Auckland A162/2003, 19 September 2003
- Power v Whakatane District Council* HC Tauranga CIV-2008-470-456, 30 October 2009
- Rotokawa Joint Venture Ltd v Waikato Regional Council* EnvC Auckland A041/07, 18 May 2007
- Shell New Zealand Ltd v Porirua City Council* CA57/05, 19 May 2005
- Smith v Takapuna City Council* (1988) 13 NZTPA 156 (HC)
- Wakatipu Environmental Society Inc v Queenstown Lakes District Council* EnvC Christchurch C135/2002, 30 October 2002

Appeal

This was an appeal against an Environment Court decision confirming 25-year resource consents for the operators of the Tasman Mill to take water from the Tarawera River and discharge treated wastewater, stormwater and landfill leachate.

D J Fletcher, M S King and B L Bailey for appellants

P H Cooney for respondent

P F Majurey and T L Hovell for applicants

Cur adv vult

WYLIE J

[1] The appellants Society appeals under s 299 of the Resource Management Act 1991 (“the Act”) against a decision given by the Environment Court dismissing an appeal from hearings commissioners appointed by the respondent, the Bay of Plenty Regional Council, and the Whakatane District Council.

[2] The decision relates to two of the resource consents required to enable the Tasman Mill to operate. They were sought by Norske Skog Tasman Ltd, Carter Holt Harvey Pulp & Paper Ltd, and Water and Waste Services (jointly “the applicants”).

[3] The Environment Court issued an interim decision on 29 September 2010¹. The Court confirmed the hearings commissioners' decision in relation to an air discharge consent (number 65725) and a "water consent" (number 65722)², and invited the parties to submit their views to the Court on the wording of two conditions which the Court wished to impose on the grant of the water consent. Views were expressed by the applicants and the respondent council, and the Court then issued a final decision on 27 October 2010. This decision finalised a full set of conditions applicable to all consents, including water consent 65722.

The appellant

[4] The appeal to the Environment Court against the joint decision of the hearings commissioners appointed by the respondent and the Whakatane District Council was brought by Messrs T and L Marr, and by Te Rangatiratanga o Ngati Rangitihī Incorporated ("the Society").

[5] The appeal from the Environment Court's decision to this Court was initially brought by a Mr R A Paterson. Mr Paterson claimed that he was a successor to the Society under s 2A of the Act because it had been proposed to wind-up the Society and he claimed that he was entitled to take over the appeal.

[6] In the event the winding-up of the Society has not been completed. The Society, through its secretary Mr David Potter, has filed an affidavit asserting that Mr Paterson was not its successor, and asserting that he had no standing to bring the appeal. The Society however still wishes to pursue the appeal, and to that end Mr Paterson applied for an order substituting the Society as the appellant in these proceedings.

[7] There are difficulties with this approach:

- (a) Mr Paterson was not the applicant, and had not made submissions on the initial resource consent applications. It follows that he had no right to appeal to the Environment Court, see s 120(1) of the Act. Nor did he have any right to appeal to this Court, because he was not a party to the proceedings before the Environment Court — s 299(1).
- (b) The Society did not file a notice of appeal against the Environment Court's decision within the requisite 15 working day period required by s 300(1).

[8] It follows that there was no valid appeal brought to this Court and the applicants could have sought to strike the appeal out.

[9] Carter Holt Harvey Pulp & Paper Ltd needs to replace a boiler, the certification for which expires on 21 March 2011. Without that boiler the Tasman Mill cannot operate. Replacing the boiler is a significant engineering undertaking, scheduled to start on 12 February 2011, and involving specialist tradesmen from Australia. Carter Holt Harvey needs to finalise its plans for the boiler replacement by the end of December 2010. If there is uncertainty over the outcome of the resource consents, then the boiler cannot be replaced. The Mill would be forced to shut down, with obvious adverse economic effects to Carter Holt Harvey, and to the wider Bay of Plenty region. With these deadlines in mind, the applicants had applied for an urgent fixture, and that request was granted by Priestley J in a minute issued on 25 November 2010.

[10] The applicants as a result do not wish to knock the appeal out on a technicality, and then be exposed to the risk of the Society belatedly seeking leave to appeal out of time. They preferred that the Court should deal with the appeal on its merits at the earliest possible opportunity.

1 *Marr v Bay of Plenty Regional Council* (2010) 16 ELRNZ 197 (EC).

2 More particularly described at [15] below.

[11] Accordingly, and by consent, I directed the Society to file a notice of appeal, together with an application for leave to appeal out of time under s 306 of the Act by 5 pm on Friday 10 December 2010. Mr Majurey for the applicants, and Mr Cooney for the respondent, indicated that their respective clients consented to the application for leave to appeal out of time being granted, so that the appeal could proceed on a substantive basis.

[12] The notice of appeal and an application for leave to appeal out of time were filed within the time I had set. By consent, I grant leave to appeal out of time. I now turn to consider the substantive issues raised by the notice of appeal.

Background facts

[13] The Tasman Mill at Kawerau operates from a site next to the Tarawera River. It comprises a kraft pulp mill which is now owned and operated by Carter Holt Harvey Pulp & Paper Ltd and a paper mill which is owned and operated by Norske Skog Tasman Ltd. Both companies are parties to an unincorporated joint venture known as Waste and Water Services which operates their combined waste operations from the mill.

[14] Historically, the Tasman Mill operated under its own Act, the Tasman Pulp and Paper Company Enabling Act 1954. As from 31 March 1995, its operations became subject to the provisions of the Resource Management Act. The initial resource management consents for the Tasman Mill were sought in December 1994. They were eventually granted subject to conditions in 2003. The 2003 consents are due to expire on 31 December 2012. However, the applicants did not wish to wait for this term to expire, and opted to apply for new consents in 2009. This was largely due to the need to replace the boiler, which I have noted above. The total cost of replacing that boiler is some \$60 million. The applicants consider that this capital investment can only be justified if they can obtain the necessary resource consents for a term which enables them to amortise their costs.

[15] In April 2009, the applicants applied for a number of consents including consent to discharge up to 220,000 cubic metres per day of waste and stormwater into the Tarawera River. In this respect they sought consent under s 13(1)(a) to place, use and maintain structures in the bed of the river; consents under s 13(1)(b) to disturb the bed of the river to maintain the intake and discharge structures; consent under s 14(1)(a) to take and use water from the river; consent under s 15(1)(a) to discharge treated wastewater, stormwater and landfill leachate to the river; consent under s 15(1)(b) to discharge stormwater onto or into land; and consent under s 15(1)(d) to discharge stormwater from industrial premises onto or into land. The application for these various consents was allocated number 65722. They have been referred to jointly as the “water consent”, and I adopt that expression.

[16] A number of other consents were sought at the same time.

[17] The Society had made submissions in respect of all resource consent applications.

[18] The applicants required consents both from the respondent, Environment Bay of Plenty, and from the Whakatane District Council. Those bodies appointed hearings commissioners, who held a joint hearing. The joint decision was issued on 15 October 2009. The consents sought were granted for a period of 25 years. A number of conditions were imposed.

[19] Three appeals were lodged. The Society initially challenged the grant of all of the consents by the Regional Council. At the Environment Court hearing it maintained its appeal only in relation to water consent 65722 and air discharge consent 65725. Mr Marr appealed only against the grant of water consent 65722.

[20] The appeals to the Environment Court were heard at Tauranga over 19-21 May 2010, and 24-28 May 2010.

Environment Court decision

[21] Unusually, the Court comprised not only an Environment Court Judge, Judge Harland, but also the Deputy Chief Māori Land Court Judge, Judge Fox. Judge Fox was appointed as an Alternate Environment Court Judge given concerns raised in relation to Māori cultural values arising from the discharge application. There were also two Environment Court Commissioners, Commissioners Kernohan and Fletcher.

[22] The Court issued its interim decision on 29 September 2010 and the matters raised by the Society can be found in that decision.

[23] The discharge of waste and stormwater into the Tarawera River is a non-complying activity. As a result, the application was required to be considered under s 104D of the Act. Further, it was required to be considered under s 107 because the discharge causes a conspicuous change in the colour and visual clarity of the river after reasonable mixing. The Court could only grant the water consent sought if it was satisfied that “exceptional circumstances” justified it in doing so — s 107(2)(a).

[24] The Court started by identifying the issues. It then considered background matters, in relation to the river and its catchment, the people who reside in the catchment area, and the history of the Tasman Mill. It then outlined the legal and planning framework and identified the relevant plans it was required to consider.

[25] The Court then looked at the social and economic factors relevant to the applications, and noted that there was little dispute that the Tasman Mill generates considerable positive economic and social benefits. It also noted that closure of the mill would have a major dislocating effect on Kawerau and on the wider Bay of Plenty in both the short and medium term.

[26] The Court then turned specifically to consider the water consent. It asked itself, first, whether or not the consent could satisfy one or other of the gateway or threshold tests set out in s 104D(1) of the Act. It noted that because the discharge causes a conspicuous change in the colour and visual clarity of the river after reasonable mixing, the adverse effects of the activity on the environment could not be said to be minor under s 104D(1)(a). It therefore asked itself whether or not the activity was contrary to the objectives and policies of the relevant plans pursuant to s 104D(1)(b). It concluded that the proposal was not opposed to the general direction of the policies and objectives of the relevant planning instruments, and that any concerns were able to be met by the imposition of the appropriate conditions. It then went on to evaluate the proposal by reference to the provisions of ss 104(1) and 107. It looked at cultural values, treaty issues, and recreational values, as well as river ecology, and effects on aquatic plants, macroinvertebrates and fish life. It then looked at colour, clarity and odour issues. It undertook an evaluation under s 107. It concluded that there were exceptional circumstances in terms of s 107(2)(a), such that the granting of the consent was justified. It evaluated the proposal under s 104. It then considered s 105(1) and concluded that the proposed discharge to water was “the best that [could] be done for now”.

[27] The Court then went on to deal with the air discharge permit. This permit is not relevant for present purposes because the Society does not appeal the Court’s decision in this regard. Therefore, I do not consider it further.

[28] As required by the Act, the Court then considered the value of the applicants’ investment in the Tasman Mill pursuant to s 104(2A). It accepted that the applicants’ investment in the Tasman Mill was in the order of at least \$500 million to \$1 billion.

[29] The Court next considered Part 2 issues, focusing its attention on s 6(e). It noted that the proposal concerned the relationship of Māori and their culture and traditions with the river, and accepted that river water is taonga. It had particular regard to kaitiakitanga in terms of s 7 of the Act, and it took into account the principles of the Treaty of Waitangi under s 8. It assessed the evidence in relation to each of these various matters, and noted that the effects asserted by the appellants could not be used as a basis to invoke ss 6, 7 and 8 so as to accord a priority for their interests, or so as to veto other relevant considerations pertinent to achieving the purpose of the Act under s 5.

[30] The Court then went on to consider the purpose of the Act. It concluded that the purpose of the Act would be met by granting the consents subject to stringent conditions and a limited term. It acknowledged that the effect of the discharge on the colour and clarity of the river is an adverse affect, but considered that it could not be avoided without closing the Tasman Mill. Further, it expressed the view that the effect could be mitigated by conditions.

[31] The Court then considered the appropriate term, and what conditions to impose. It noted that the applicants had sought a 35-year term, but that the hearings commissioners had imposed a term of 25 years on all consents. It considered the applicable law, and then reviewed the evidence. It concluded that a 25-year term which allowed for a wholesale review of the adverse effects was appropriate. It indicated that the water consent would be conditional on there being a long-term and significant commitment by the applicants to a research programme into reducing the discharge of colour, and a further commitment to the investment required to reduce the discharge of colour to inconspicuous levels over the life of the consent. It indicated that it wished to impose mandatory conditions in this regard, and invited the parties to comment on the same.

[32] In the event the applicants and the respondent filed memoranda within the time period specified by the Court. No submissions were lodged by the Society, or by Mr Paterson.

[33] The Court issued its final decision on 27 October 2010 putting in place detailed conditions for, inter alia, water consent number 65722.

Notice of appeal

[34] The notice of appeal initially raised by Mr Paterson alleged seven errors of law. The errors of law related only to water consent number 65722. In the initial submissions lodged in support of the appeal, counsel confirmed that Mr Paterson did not intend to pursue his appeal in regard to air discharge consent number 65725.

[35] In the notice of appeal filed on behalf of the Society on 10 December 2010, the only aspects of the Environment Court's decision that have been challenged relate to the water consent (number 65722). Further, four of the alleged errors of law initially raised by Mr Paterson were no longer pursued.

[36] The matters put in issue were as follows:

- (a) Did the Environment Court err in law in not adequately considering the affects of the discharge from the Norske Skog paper mill in isolation from the discharge from the kraft pulp mill owned and operated by Carter Holt Harvey?
- (b) Did the Environment Court err in law in finding that "exceptional circumstances" existed so as to justify the grant of consent under s 107(2)(a) of the Act?

- (c) Did the Environment Court err in law in finding that a 25-year term of consent was appropriate despite its finding that there were “no technological solutions for colour reduction on the horizon”?

[37] Various other questions of law were also raised. I refer in particular to [23](b), (e) and (f) in the notice of appeal dated 10 December 2010. None of these questions of law were advanced by the Society at the hearing, and they are not founded in the grounds of appeal set out in the body of the notice of appeal. I therefore do not give these alleged errors any further consideration.

Nature of appeal

[38] The appeal is brought pursuant to s 299 of the Act. Relevantly, it provides as follows:

299. Appeal to High Court on question of law

- (1) A party to a proceeding before the Environment Court under this Act or any other enactment may appeal on a question of law to the High Court against any decision, report, or recommendation of the Environment Court made in the proceeding.

[39] To succeed, an appellant must identify a question of law arising out of the Environment Court’s decision, and then demonstrate that that question of law has been erroneously decided by the Environment Court.³

[40] The limits on the right of appeal were discussed by a full High Court as follows:⁴

this Court will interfere with decisions of the Tribunal only if it considers that the Tribunal—

- (a) Applied a wrong legal test; or
- (b) Came to a conclusion without evidence or one to which on evidence, it could not reasonably have come; or
- (c) Took into account matters which it should not have taken into account; or
- (d) Failed to take into account matters which it should have taken into account.

...

Moreover, the Tribunal should be given some latitude in reaching findings of fact within its areas of expertise. ...

Any error of law must materially affect the result of the Tribunal’s decision before this Court should grant relief. ... (citations omitted)

[41] It is trite law that this Court will not concern itself with the merits of the case under the guise of a question of law, and that the weight to be given to the assessment of relevant considerations is for the Environment Court alone, and not for reconsideration by the High Court as a point of law.⁵ The Court will be vigilant in resisting attempts by litigants disappointed before the Environment Court to use appeals to the High Court as an occasion for revisiting resource management merits under the guise of questions of law.⁶

[42] I now turn to consider the matters raised in the notice of appeal with these limitations in mind.

3 *Smith v Takapuna City Council* (1988) 13 NZTPA 156 (HC) at 159.

4 *Countdown Properties (Northlands) Ltd v Dunedin City Council* (1994) 1B ELRNZ 150, [1994] NZRMA 145 (HC) at 157-158, 153.

5 *Nicholls v Papakura District Court* [1998] NZRMA 233 (HC) at 235; *Friends of Pakiri Beach v Auckland Regional Council* [2009] NZRMA 285 (HC) at [19].

6 *Power v Whakatane District Council* HC Tauranga CIV-2008-470-456, 30 October 2009 at [14].

Was it incumbent on the Environment Court to consider the discharge from the Norske Skog paper mill separately from the discharge from the Carter Holt Harvey pulp mill?

Submissions

[43] The Society alleged that the Environment Court erred in law by taking into account irrelevant factors in assessing the social and economic effects of the Norske Skog mill and the Carter Holt Harvey mill together.

[44] Mr King for the Society submitted:

- (a) that the Environment Court in its decision at [1] treated the Tasman Mill as comprising both the pulp mill owned by Carter Holt Harvey, and the paper mill owned by Norske Skog;
- (b) that the Environment Court referred to both mills together elsewhere in the decision;
- (c) that the combined discharge from the two mills is on average 23 tonnes per day;
- (d) that three to five tonnes per day is estimated to come from the Norske Skog mill, and that the balance is attributable to the Carter Holt Harvey mill;
- (e) that the Carter Holt Harvey mill is therefore responsible for between 79-87 per cent of the total discharge;
- (f) that the Environment Court considered, and the Society accepted, that a colour discharge of 10 tonnes per day was inconspicuous;
- (g) that on its own the discharge from the Norske Skog mill would not produce discolouration after a reasonable mixing; and
- (h) that the Carter Holt Harvey mill employs only 209 people, while the Norske Skog mill employs 379 people.

[45] It was then argued that the Carter Holt Harvey mill “causes up to 87 per cent of the problem”, and “in terms of s 107 all of the problem”, but provides only 35 per cent of the benefit. It was submitted that there was “enough information” before the Environment Court to put it on notice that it should have assessed each mill separately when considering the consent application. Indeed, Mr King put it to me that it was incumbent on the Environment Court to do so once it saw that the majority of the adverse effects came from one mill only. It was submitted that the Environment Court took into account irrelevant factors, namely the social and economic effects of the Norske Skog mill, when considering that part of the discharge application which related only to the Carter Holt Harvey mill.

[46] Mr Majurey for the applicants asserted that the Environment Court made findings on the merits in relation to the social and economic benefits of the Tasman Mill, comprising both the Carter Holt Harvey pulp mill and the Norske Skog paper mill. He also noted that the Environment Court considered the social and economic evidence on an individual mill basis, and that the Court received direct evidence in relation to each mill. It was also noted that the activity applied for was a single river discharge consent made by the joint venture entity, Water and Waste Services.

[47] Mr Cooney for the respondent submitted that the short answer to the argument was that the Court did consider the effects of closure of one or other of the two mills, as well as the Tasman Mill itself. He also noted that the Court was not asked to consider the two mills separately, and that the applicants had not sought separate approvals for separate discharges. He noted that the wastewater streams from both

mills are integrated, that they are treated as combined wastewater that goes into shared treatment facilities, and that they are ultimately discharged to the Tarawera River under the same consent.

Analysis

[48] The alleged error of law is not particularly clear. As noted in [36](a) above, the question of law posed queries whether the Environment Court “adequately” considered the discharge from the two mills separately. This implies that some consideration was given to the issue. If that is the case, then the Society is doing no more than asking this Court to revisit the merits of the Environment Court’s conclusion, which is something the Court will not do on an appeal limited to points of law. Perhaps recognising this, the Society seeks to undermine the Environment Court’s evaluation under s 104(1) by asserting that the Court was required to consider the two mills separately. If the Society is correct in this regard, it would follow that the Environment Court had applied a wrong legal test and this would be point of law in respect of which this Court could intervene. This, however, was not how the issue was argued. Rather, the Society submitted that the Environment Court erred in law by taking into account irrelevant factors. It argued that the social and economic benefits associated with the Norske Skog paper mill were irrelevant to any consideration of the discharge from the Carter Holt Harvey pulp mill. Implicit in this argument is an assertion that the Environment Court was required to consider the two mills separately, and indeed Mr King made submissions to this end.

[49] I start by considering the relevant provisions in the Act. Section 88(1) provides that a person may apply to the relevant consent authority for a resource consent. Section 88(2) details what must be provided for in an application. It is the application made by the applicant (together with any permissible amendments to that application)⁷ which defines the scope of the consent authority’s jurisdiction, and thus the jurisdiction of the Environment Court.

[50] Once an application is made, the Act’s processes are engaged. For example, if further information is required, the same can be sought by the consent authority — s 92. If additional consents will also be required, the consent authority may defer the notification or hearing of the application — s 91. The consent authority can invite the applicant and some or all of those who have made submissions to a prehearing meeting — s 99. With the consent of those involved, it may refer an application to a mediation — s 99A. Otherwise, the consent authority must deal with the application as made within the time-frames set down by the Act. If it considers that a hearing is necessary, or if the applicant or a “submitter” requires a hearing, then it must hold one — s 100. The consent authority is obliged to consider an application under s 104(1). It has jurisdiction to grant or refuse the application, and if the application is granted, to impose conditions — s 104B. There can be an appeal to the Environment Court — s 120. The Court must have regard to the decision the subject of the appeal — s 290A. Otherwise the Court has the same power, duty and discretion in respect of a decision appealed against as the person against whose decision the appeal is brought — s 290(1).

[51] Throughout the process, it is “the application” made in terms of s 88 (together with any permissible amendments to that application) which falls for consideration.

⁷ *Darroch v Whangarei District* PT Auckland Decision A18/93, 1 March 1993 (PT); *Wakatipu Environmental Society Inc v Queenstown Lakes District Council* EnvC Christchurch C135/2002, 30 October 2002; *Shell New Zealand Ltd v Porirua City Council* CA57/05, 19 May 2005.

[52] Here the application to discharge into the Tarawera River was a single application made in the names of Norske Skog Tasman Ltd and Carter Holt Harvey Pulp & Paper Ltd operating as Water and Waste Services, an unincorporated joint venture. The application recorded:

- (a) that the two companies operated within the same industrial site, sharing some facilities;
- (b) that Water and Waste Services was an unincorporated joint venture that had been established by the two companies, and that it was responsible for operating and maintaining many of the joint activities associated with the Tasman Mill operations;
- (c) that those activities related primarily to water extraction, processing wastewater, stormwater discharge and solid-waste disposal;
- (d) that stormwater was collected, treated, and then pumped into the wastewater treatment system for further treatment and discharge along with the processed wastewater; and
- (e) that processed wastewater from the Norske Skog and Carter Holt Harvey operations was combined and treated prior to discharge in a biological wastewater treatment system.

[53] In my judgment, it is this application which frames how the matter must proceed and there is nothing in the Act to suggest that it was incumbent on the Environment Court to split the application into parts, and deal with them separately.

[54] The Society relied upon two decisions of the Environment Court in support of its argument. I refer to each in turn.

- (a) In *Motorimu Wind Farm Ltd v Palmerston North City Council*,⁸ the applicant applied for consent for a 127-turbine wind farm. Commissioners appointed by the consent authorities granted consent to 75 turbines. The applicant then appealed seeking that consent be granted to all 127 turbines. By the time the matter came before the Environment Court, Motorimu had refined and amended its proposal, so that its appeal related to only 38 of the 52 turbines for which consent had been declined by the Commissioners. One of the matters in issue concerned the effect on the landscape of the proposed turbines. Landscape witnesses considered the effects of different groups of turbines in various areas where the additional turbines were proposed. The Court focused its consideration on the landscape groupings described by the landscape experts. Ultimately, the Court declined the appeal in respect of some of the additional turbines, and allowed it in respect of others.
- (b) In *Meridian Energy Ltd v Wellington City Council*,⁹ the applicant sought consent to establish a 70-turbine wind farm. Again, one of the primary issues was visual amenity and natural character. The Environment Court conducted its assessment by reference to particular landscape areas identified by the experts. It granted consent for some turbines in some areas, and declined consent for some turbines in other areas.

[55] There is nothing in either decision suggesting that it is incumbent on the Environment Court to break an application into its component parts. In both cases, the Court chose to consider discrete landscape areas as a matter of convenience and

⁸ *Motorimu Wind Farm Ltd v Palmerston North City Council* EnvC Wellington W067/08, 26 September 2008.

⁹ *Meridian Energy Ltd v Wellington City Council* EnvC Wellington W031/07, 14 May 2007.

because a different evaluation was required for each area. Although it is not clear from the decisions, it seems that the applicants must have consented to this approach. Moreover, there was only one applicant in both decisions.

[56] Here, Norske Skog and Carter Holt Harvey elected to make a joint application. In terms of the Act, the Environment Court was required to deal with that application on its terms. It chose to dismiss the appeal, but to amend the consent conditions. That course was clearly open to it. It was also open to it to allow the appeal, and decline the application. It could, in the process of declining the application, have indicated, obiter, that an application by one of the applicants only might be more likely to gain consent. But unless Norske Skog and Carter Holt Harvey agreed, they were entitled to a decision on the application as made by them.

[57] Further, and in any event, the Environment Court did address the mills on an individual basis. For example, it looked at the individual employment levels for each mill.¹⁰ It referred to a 2006 economic study on the Norske Skog mill alone.¹¹ It observed that the closure of one or both of the mills would have a major dislocating affect on Kawerau, and on the wider Bay of Plenty in both the short and medium terms.¹² It is clear that the Environment Court had evidence before it in relation to each mill — for example, from a Mr Landman, Chief Executive of Carter Holt Harvey’s New Zealand pulp & paper business, and from a Mr Hacker, General Manager of the Norske Skog Tasman paper mill.

[58] I cannot see that the Environment Court erred in law, or that it took into account an irrelevant consideration when it considered the application in its terms. The answer to the first question posed in the notice of appeal is “No”. The appeal in this respect is dismissed.

Section 107(2)(a): Exceptional circumstances

Submissions

[59] The Society submitted that, when the Environment Court assessed under s 107(2) whether or not exceptional circumstances existed justifying the grant of consent, it:

- (a) came to a conclusion, which, on the evidence it could not reasonably have come to; and
- (b) took into account matters which it should not have taken into account.

[60] It noted that the Environment Court held that there were no individual factors that were out of the ordinary or exceptional.¹³ It then submitted that there had to be at least one circumstance that is exceptional on its own merits to allow the decision-maker to consider whether that circumstance alone, or in combination with other circumstances, justifies the granting of consent. It was argued that there was nothing in the Environment Court’s decision to say what it was that made the combination of circumstances itemised by the Court exceptional. It was submitted that the Environment Court did not identify any particular exceptional circumstance or circumstances, and that because none of the factors listed were exceptional in themselves, that it was not open to the Environment Court to conclude that exceptional circumstances existed overall. It was submitted that a list of unexceptional circumstances cannot be elevated to the exceptional merely because they are aggregated.

¹⁰ At [42] fn 55.

¹¹ At [48].

¹² At [50].

¹³ At [219].

[61] Further, Mr Fletcher for the Society went through each of the factors itemised by the Environment Court. He submitted that the Environment Court's reference to the Tasman Pulp and Paper Company Enabling Act was irrelevant to the issue of whether or not exceptional circumstances existed. He also argued that the Court's reference to the fact that s 107 was specifically enacted with the Tasman Mill and the pulp and paper industry in mind cannot be considered to be a relevant circumstance. Other circumstances mentioned by the Environment Court were dismissed as being non-exceptional, or neutral. Mr Fletcher did, however, accept that one matter mentioned by the Court — namely that in terms of actual effects on aquatic life, the effect of colour and visual clarity was minor, is relatively unusual.

[62] Mr Fletcher submitted that these errors materially affected the Environment Court's conclusion, and he noted that the Court recorded that its decision was finely balanced,¹⁴ and that its end conclusion under s 107(2)(a) was reached by a very narrow margin.¹⁵

[63] Mr Majurey for the applicants submitted that whether or not exceptional circumstances applied, depends on the facts of each case and the judgment of an expert court. He submitted that here there were a number of factors that aggregated to qualify as exceptional circumstances, and that the Society's argument that exceptional circumstances require at least one exceptional circumstance does not bear close scrutiny. He submitted that each of the matters itemised by the Court was relevant to an overall assessment of the application under s 107, and that the references to the history of the mill, the background to s 107 and past performance all informed the issue of whether or not exceptional circumstances existed. He argued that no error of law had been made.

[64] Mr Cooney for the respondent submitted that the Society's submissions were no more than an attempt by the Society to litigate factual issues. He submitted that what constitutes exceptional circumstances involves a factual assessment of the evidence and the weighing of competing arguments, all of which are matters for assessment by the Environment Court, and not for reconsideration by this Court on appeal under the guise of a question of law.

Analysis

[65] Relevantly, s 107(2) Provides:

107. Restriction on grant of certain discharge permits

...

(2) A consent authority may grant a discharge permit or a coastal permit to do something that would otherwise contravene section 15 or section 15A that may allow any of the effects described in subsection (1) if it is satisfied—

(a) That exceptional circumstances justify the granting of the permit; or

...

and that it is consistent with the purpose of this Act to do so.

[66] There has been relatively little case law in relation to s 107.

[67] In *Rotokawa Joint Venture Ltd v Waikato Regional Council*,¹⁶ Contact Energy Ltd had applied for consent to enable the continued operation of the Wairakei and Poihipi Power Stations. The Court noted as follows:

¹⁴ At [128].

¹⁵ At [219].

¹⁶ *Rotokawa Joint Venture Ltd v Waikato Regional Council* EnvC Auckland A041/07, 18 May 2007.

[413] We find that there are exceptional circumstances in the case of these consents namely:

- The Wairakei/Tauhara Geothermal System has been acknowledged as a unique circumstance where pressure drawdown over 50 years has led to a stable and sustainable electricity supply. The evidence before us is that outfield injection is necessary to ensure the continued production of the Wairakei Power Station and discharge of more fluid to the Waikato River than already permitted by these consents would be undesirable.
- The deep aquifers which are the receiving environment are so deep that it is most unlikely that it would be necessary to source water from these aquifers for consumption by domestic animals. While it may be that deep aquifers in the region are used at a future date for other agricultural industrial purposes, there is abundant water available for stock drinking purposes.

[68] In *Paokahu Trust v Gisborne District Council*,¹⁷ the council had applied for three coastal permits to enable the continued use of its existing wastewater outfall. The Court was satisfied that the discharge, after reasonable mixing, was likely to give rise to the effects set out in ss 107(c) and (d) and in the receiving waters. It applied the dictionary meaning of “exceptional”, and considered that “exceptional circumstances connotes something out of the ordinary”.¹⁸

[69] The Environment Court in the present case considered both of these decisions, and adopted the meaning of exceptional as outlined in *Rotokawa* and *Paokahu Trust* as the commonsense and proper interpretation to be applied.¹⁹

[70] The Society does not suggest the Environment Court applied the wrong legal test. Rather it criticises the Environment Court’s application of the test.

[71] The Environment Court applied the test at [128] of its decision. It stated as follows:

Evaluation under s 107

[128] The decision on this issue is finely balanced. Having considered all of the evidence and the legal principles, by a narrow margin we are persuaded that the granting of the consent is justified in terms of s 107(2)(a) as an exceptional circumstance. It is the combination of the following factors that has led us to this view:

- [a] Whilst the Tasman Mill may not be classified as being as significant as the production of electricity or the disposal of human waste as in *Rotokawa* and *Paokahu*, it is nevertheless a nationally and regionally significant physical resource that contributes significant positive and social economic effects.
- [b] The importance of the Tasman Mill is also illustrated by its history. The fact that it was subject to the Enabling Act suggests that the site and operation were considered unique and amounted to something “out of the ordinary”, but we acknowledge the fact that because the process by which the Tasman Mill was established was exceptional, does not necessarily mean that it continues to be so.
- [c] Section 107 was specifically enacted as it was with the Tasman Mill and the pulp and paper industry in mind.
- [d] The operation of the Tasman Mill is 100% reliant on the river for water and as a discharge medium. Without access to the river water the Tasman Mill would close.

¹⁷ *Paokahu Trust v Gisborne District Council* EnvC Auckland A162/2003, 19 September 2003.

¹⁸ At [77].

¹⁹ At [81]-[83].

- [e] Colour is an inherent by-product of pulp and paper production. We accept that there have been improvements to the treatment processes and technology has substantially reduced the discharge of colour to the river over the period of the 2003 consent. This has improved the visual clarity of the river.
- [f] We accept that the evidence establishes that in terms of actual effect on aquatic life, the effect of colour and visual clarity is minor. This aspect has been given considerable weight by us.
- [g] The technology to reduce the discolouration of the discharge to an inconspicuous point is not currently available. In fact, the reason for the increase in colour loading created by the wastewater treatment plant is still unknown. This however does not mean that the effects of the discolouration cannot be mitigated, by being steadily reduced. We are satisfied there is a commitment by the Tasman Mill owners to actively seek ways to reduce the colour discharge to the river.

Further, and when it was considering what term to grant, the Court observed as follows:

[219] We have decided by a very narrow margin that s 107(2)(a) of the RMA applies in this case. As we have said, each of the factors relied on by the applicants would not of themselves have been exceptional, it is the combination of them which has led us to that decision. We agree with the Hearings Commissioners that the protection of s 107(2)(a) cannot be permitted to run regardless.

[72] It seems to me that whether exceptional circumstances exist is essentially an issue of fact requiring evaluation by the Environment Court. It has to weigh all of the material before it and make a factual finding as to whether or not there are exceptional circumstances on the evidence which it has heard.

[73] Here the Environment Court set out a number of factors, and it considered that, in combination, those factors justified the grant of consent under s 107(2)(a) as an exceptional circumstance. There is nothing in the Act which precludes the Environment Court from taking this approach, and indeed in my judgment, it is an eminently sensible approach. Frequently a number of factors in combination can compel a conclusion which is not apparent if consideration is confined to one factor alone. There is no logical reason why such an approach should not be taken under s 107(2)(a).

[74] The Environment Court considered that the itemised factors in combination were an exceptional circumstance. Section 107(2)(a) refers to exceptional circumstances. However, words in the plural include the singular.²⁰ There is nothing in the legislation to preclude the Environment Court from concluding that there is an exceptional circumstance, as a result of a combination of different factors, and that that exceptional circumstance justifies the grant of consent under s 107(2)(a).

[75] Moreover, when each of the matters itemised by the Environment Court is considered, it can readily be seen that each is a relatively unusual circumstance:

- (a) The Court concluded that the Tasman Mill is a nationally and regionally significant physical resource that contributes significant positive and social economic effects. Not every, or even most, physical resources the subject of a resource consent application can justify that claim.
- (b) The Tasman Mill initially operated under its own enabling Act. The process by which the mill was established was very unusual. Very few physical resources have had their own enabling Act. The fact that the mill had its own enabling Act cannot be relied on forever as being an

20 Interpretation Act 1999, s 33.

exceptional circumstance, and the Environment Court so held. The fact that there was an enabling Act however remains an unusual circumstance which informs the issue of whether or not there are exceptional circumstances.

- (c) The fact that s 107 was enacted with the Tasman Mill and the pulp and paper industry in mind is also an unusual circumstance. Again it cannot be relied on in perpetuity as being an exceptional circumstance, but the Environment Court did not suggest otherwise. It is a statement of historical fact which informs the issue.
- (d) The fact that the operation of the mill is 100 per cent reliant on the river both for water and as a discharge median is less unusual, but it is nevertheless relatively uncommon for an activity to be 100 per cent reliant on water from one source for its processes and to be 100 per cent reliant on water from the same source for discharge purposes.
- (e) The fact that colour is an inherent byproduct of pulp and paper production is a statement of fact, but again it informs the issue. So does the history of improvements in treatment processes and technology.
- (f) The Court's finding that the effect of colour and visual clarity was minor, in terms of its actual effect on aquatic life, is highly unusual. Normally one would expect the opposite. It is noteworthy that the Court recorded that aspect was given considerable weight by it.
- (g) It is also unusual that technology to reduce the discolouration of the discharge to an inconspicuous point is not currently available, but that there is a commitment by the Tasman Mill owners to actively seek ways to reduce the colour discharge to the river.

[76] The Environment Court considered that none of these matters were, of themselves, exceptional. That is a finding it was entitled to make on the materials before it. It also considered that, in combination, they constituted an exceptional circumstance. In my judgment, that conclusion cannot be faulted. The Environment Court did not apply the wrong legal test. It did not come to a conclusion without evidence, or to one which on the evidence it could not reasonably have come. It did not take into account matters which it should not have taken into account, and did not fail to take into account matters which it should have taken into account. In my view each of the matters identified by the Environment Court at [128] of its decision was relevant to the s 107(2)(a) assessment. Some of them were historical, and as the Environment Court recognised, "the protection of s 107(2)(a) cannot be permitted to run regardless".²¹ This however does not mean that those historical factors are irrelevant. They can still inform the analysis. Some of the factors are no doubt more relevant than others, but it cannot be asserted that any of them were irrelevant. The matters raised by the Society seem to me to go to the weight that has been given to the conflicting considerations before the Environment Court and to the end conclusion that the Court recorded. This does not raise a point of law.

[77] In my judgment, the Environment Court did not err in law when it held that there was an exceptional circumstance which justified the grant of the consent sought in terms of s 107(2)(a) of the Act. This aspect of the appeal is dismissed as well.

Appropriateness of a 25-year term

[78] The Society submitted that in assessing term, the Environment Court reached a conclusion to which, on the evidence, it could not have reasonably come. It argued that the Court made various findings of fact including the following:

²¹ At [204] and [219].

- (a) Technology currently available to reduce discolouration is too costly and uneconomic for a mill the age of the Tasman Mill.
- (b) Given the mill's age, while improvements in production processes will assist, there are no further technological solutions on the horizon.
- (c) That a target to reduce the colour discharge to 10 tonnes per day by the expiry of the consent was merely an aspiration.
- (d) That given the significance of the colour discharge, the amount invested by the applicants into research aimed at reducing that discharge was not "at all impressive".

[79] The Society submitted that given these findings, no reasonable court could have concluded that a 25-year term was appropriate, and that the "only reasonable and true conclusion" the Court could have reached was that a shorter term was required.

[80] Mr Majurey for the applicants argued that case law establishes that it is appropriate to utilise resource consent conditions, and in particular s 128 review conditions, rather than a reduced term to address potential adverse effects. He submitted that there was substantial evidence before the Environment Court to justify the grant of a 25-year consent, including the significant social and economic benefits associated with the Tasman Mill, the significant value of the applicants' investment, and the fact that but for the colour, the adverse effects of the discharge were no more than minor. He submitted that the Environment Court had considered and balanced the various factors and adopted the approach of setting a 25-year term coupled with stringent resource consent conditions to address its concerns. It was submitted that this outcome was available to the Environment Court, that the Society's challenge was essentially disagreeing with the outcome, and that it did not raise a point of law.

[81] Mr Cooney for the respondent Council submitted that the consent conditions imposed by the Environment Court placed a mandatory obligation on the applicants to reduce colour to an inconspicuous level during the term of the consent, and that this was consistent with the concerns expressed by the Court. He argued that the Court upheld the 25-year term fixed by the hearings commissioners after carefully weighing up the reasons for having a shorter term as opposed to a longer term. He submitted that it was open to the Court to decide that a longer term was appropriate to provide security of investment for the applicants, subject to appropriate conditions requiring them to improve discharge quality over the term of the consent. He submitted that the Court was exercising a discretionary power, and that the Court had not erred in its approach.

Analysis

[82] The Environment Court started this part of its decision by referring to the decision of the hearings commissioners. It noted that the applicants had requested 35-year consents, but that the commissioners had instead imposed a term of 25 years on all consents. The Court considered that the reasons expressed by the commissioners for adopting a 25-year term were not particularly clear, and stated that for that reason, it had decided to consider "more analytically" the evidence in support of a 25-year term. The Court then referred to that evidence, and to the parties views on length of term. It noted that the applicants were seeking a longer-term consent to enable the ongoing operation of the mill to provide a secure base for future investment. It noted that Carter Holt Harvey was intending to spend \$60 million on a new boiler, and that

it would be spending “something like \$100 million” over the following 10 years on ongoing equipment replacement. It referred to evidence that normally, one looks at financial returns over a period of 25 years.²²

[83] The Court then went on to consider the relevant law. In particular it referred to the High Court decision in *Genesis Power Ltd v Manawatu-Wanganui Regional Council*.²³ In that case, the Environment Court granted consents for a 10-year term rather than impose a review condition. It considered that this approach better accommodated the differences between the parties and allowed them time to negotiate a “meeting of the minds”. On appeal, Wild J rejected the “meeting of the minds” construct by the Environment Court. He held that the Environment Court had to decide the question of term, or consent conditions, on the evidence that the parties had placed before it, and that it should not abdicate its decision-making responsibilities. The High Court’s decision was upheld on appeal by the Court of Appeal.²⁴ It held that a perceived lack of evidence does not provide a basis for making a decision to reduce the duration of a consent, in a manner which does not meet the Act’s sustainable management purpose.

[84] Here, the Society did not criticise the Environment Court’s analysis of the *Genesis* decision; nor did it suggest that the Court applied the wrong legal test. Rather it submitted that the Court’s application of the test has resulted in a term which is manifestly unreasonable.

[85] The Court considered that the real issue for it was how long was “*really* needed” to achieve the necessary colour reduction as against the need for security of investment. The Court considered the evidence which had been put before it. It noted that technology to further reduce colour discharge is available, but that it has only been installed elsewhere in new mills. It recorded that the capital cost is significant, and that it is not economic for a mill the age of the Tasman Mill. It also noted that there would be significant ongoing operating costs. The Court considered that the evidence established that improvements in production processes would assist, but that apart from that, there were no further technological solutions on the horizon.

[86] The Court then turned to consider the length of time needed for security of investment. It noted that the applicants’ evidence in this regard was general. It considered that there was clear evidence about the need for the replacement of the boiler, at a large capital cost, but that the evidence did not specify how long was actually needed for that investment to be recovered. It considered other evidence produced by the applicants. It noted that the Tasman Mill companies had spent very large sums acquiring the plants, and that they had spent “tens of millions of dollars” on upgrading the environmental systems. It noted that those moneys were expended with no certainty that the discharge would be permitted after 2012, or that if it was permitted, what further colour reductions would be required, and over what term. It noted evidence which had been provided to it on a confidential basis that the spending of the Tasman Mill companies on other capital items was some two to three times the capital investments spent on environment systems. It noted that investments of these magnitudes, with no certainty beyond the 2012 time-frame, indicated something about the requirement for long-term certainty for investment.

22 At [206].

23 *Genesis Power Ltd v Manawatu-Wanganui Regional Council* (2006) 12 ELRNZ 241, [2006] NZRMA 536 (HC).

24 *Ngati Rangi Trust v Genesis Power Ltd* (2009) 15 ELRNZ 164, [2009] NZRMA 312 (CA).

[87] While the Court considered that the amount invested by the applicants into research aimed at reducing the colour of the discharge was not impressive, it acknowledged that, at the same time, the companies had made considerable investment in addressing environmental deficiencies in other areas.

[88] The Court, after considering all of this material, concluded that the value of the capital investment that had been regularly made by the applicants in the past, and the need for some security for this level of investment, indicated that a term significantly longer than the five to eight years submitted by the Society was appropriate.

[89] Clearly, these findings are findings of fact and they do not raise points of law.

[90] The Court was aware of the interface between term and conditions. It noted as follows:

[223] An inconspicuous colour discharge by the end of the consent that is merely aspirational would suggest a shorter term. A condition that provided real incentives to on-going reductions in colour discharge and a real working towards an inconspicuous discharge would suggest a longer term.

[91] With this in mind, the Court endeavoured to meld its conclusion that a longer term was necessary with appropriate conditions. It wanted to ensure that the conditions were imposed to try and secure water-quality improvement. Indeed, the Court was only prepared to accept that a long-term consent was appropriate, if it was “intimately” linked to an ongoing reduction in the colour discharge. It was not prepared to agree to a consent condition which was aspirational only. It therefore required that the consent was conditional on there being a long-term and significant commitment to a research programme aimed at reducing the discharge of colour, and a commitment to the investment required to reduce the discharge of colour to inconspicuous levels over the life of the consent. It required that the research programme should be peer reviewed, and put in place within one year of commencement of the consents, and that it should be reviewed regularly in light of the ongoing results of the research and the impact of the investments in colour reduction undertaken by the applicants. It considered that such a condition was reasonable given s 107, and that the objective of an inconspicuous discharge by 2014 when the consent expires should be mandatory. It also considered that there should be intermediate reductions in the allowable discharge tied to a periodic review of the conditions. To this end, the Court was keen to ensure that strong incentives were put in place, and that the onus was put on the applicants to make the changes and investments required, unless they could show that the required reduction of colour discharge was not achievable. It considered that there should be review conditions to allow for the intermediate and final discharge levels to be modified in light of the research it required, the options for further colour reductions in colour discharge and the timing of their implementation.

[92] In its final decision, the Court put in place conditions to this effect.

[93] In my view, the Court’s analysis cannot be faulted. It applied the correct legal test. It put in place a term less than the maximum 35-year term permitted by s 123(d) of the Act, but a term sufficient to provide the applicants with some security for their existing and future investment in the Tasman Mill. It put in place rigorous consent conditions which limit the 30-day moving average colour of discharge as from the date of grant of the consent. The conditions require a reduction in that 30-day moving average colour by 1 January 2018. Further, unless a review of the conditions is undertaken at any earlier time, as from 31 December 2034, the 30-day moving average colour of the discharge is not to exceed a “platinum cobalt” equivalent of 10 tonnes per day. It is accepted by all parties that a discharge at this level is

inconspicuous. The consent conditions allow the Regional Council to review the conditions imposing these levels on receipt of a report from an independent peer review panel. The applicants are required, within 12 months from the date of commencement of the consent, to prepare a research plan report setting out the programme of research to be undertaken to identify ways in which the colour of the wastewater discharge can be reduced. The research plan is to be reviewed after seven years, and every seven years thereafter. Each research plan is to be accompanied by a separate research plan review report that certifies that the research programme provides a technically robust programme of research for enabling progress to be made. The applicants are required to undertake the programme of research contained in the research plan in a timely manner, and to prepare and submit a research plan progress report to the Regional Council on a regular basis. The applicants are also required to prepare and submit a colour reduction report that, inter alia, identifies and quantifies all individual sources of colour generated by the consent holder, sets out the results of the research programme, sets out the options available for a reduction and for treatment of colour in the wastewater discharge, details what options are being used or trialled elsewhere, and researches the practicability and affordability of those options. The colour reduction report is also to be peer reviewed. It is these peer reviewed documents which can trigger a review of the consent conditions.

[94] While I had some initial reservations about the appropriateness of imposing a condition which requires a reduction in the colour of the discharge to inconspicuous levels as at the date of termination of the consent, I am satisfied that the Court has not erred in this regard. Rather it has put in place a rigorous suite of conditions, which should ensure that as much progress as is practically possible is made in reducing the level of colour in the discharge over time.

[95] The suggestion by the Society that the only reasonable term is a shorter term is in my view unrealistic. The consequence could be that Carter Holt Harvey would not order the new boiler. The mill could close down, the workforce could be laid off, and the substantial and significant contribution the Tasman Mill makes to the national and regional economy could be lost. That is not consistent with the purpose of the Act set out in s 5.

[96] Moreover, in my judgment, the Society was simply challenging the way in which the Environment Court has exercised a discretion vested in it. It disagreed with the Environment Court's ultimate evaluation, but the matters it raised did not constitute an error of law. It follows that the answer to the third question in the notice of appeal is also "No", and that the appeal is dismissed in this regard also.

Result

[97] I have answered each of the questions posed in the notice of appeal in the negative. The appeal is dismissed.

[98] The applicants and the respondent Council are entitled to their reasonable costs and disbursements. In that regard, the applicants and the respondent, if they seek costs, are to file memoranda in that regard within 10 working days of the date of receipt of this decision. The Society is to file its memorandum in response within a further 10 working days.

[99] I will then deal with the issue of costs on the papers unless I require the assistance of counsel.

Appeal dismissed

Reported by Jennie Christianson

BEFORE THE ENVIRONMENT COURT

ORIGINAL

Decision [2011] NZEnvC 26

IN THE MATTER

of appeals under Section 120 of the Resource Management Act 1991

BETWEEN

CREST ENERGY KAIPARA LIMITED
(ENV-2008-AKL-000292)

ENVIRONS HOLDINGS LIMITED
(ENV-2008-AKL-000282)

A & C MCGILLIVRAY
(ENV-2008-AKL-000291)

DIRECTOR GENERAL OF
CONSERVATION
(ENV-2008-AKL-000293)

Appellants

AND

NORTHLAND REGIONAL COUNCIL
Respondent

CREST ENERGY KAIPARA LIMITED
Applicant

Environment Judge L J Newhook sitting alone under section 279 of the Act

IN CHAMBERS at Auckland

CORRIGENDUM

Background

1. On 3 February 2010 the Court issued its final decision, *Crest Energy Kaipara Limited v Northland Regional Council* [2011] NZEnvC 26. That decision made a



recommendation to the Minister of Conservation in relation to applications for restricted coastal activities and granted resource consents to establish, on a staged basis, an “array” of 200 turbines on the sea bed near the mouth of the Kaipara Harbour as a renewable electricity power source and connect them by two cables to a land-based substation at Poutu Point plus a Northern Wairoa River cable crossing.

2. The Court had previously issued an interim decision on 22 December 2009 and the final decision was confined to the remaining issues that the parties had been unable to resolve amongst themselves.
3. One of those issues was the term of the consents. At paragraph 19, under the heading for issue 10 term of consent, the Court indicated that the term of the consents should be 35 years.

The error

4. The Court either recommended (in the case of the restricted coastal activities) or granted (in the case of the other activities) that consent be granted subject to the conditions of consent attached to the decision.
5. However, at page 24 of those conditions the expiry date is recorded as “*30 August 2043 (35 years after the grant of consents)*”.
6. This was due to oversight as the expiry date in the proposed conditions had not been updated since the Council made its recommendation and decision in 2008.



7. Allowing for the 15 working day appeal period before the consents commence under section 116 of the Act, this should read “*24 February 2046 (or such other date being 35 years after the commencement of the consents)*”.

Order

8. Accordingly, this Court orders that the conditions attached to decision [2011] NZEnvC 26 be amended by deleting the last sentence on page 24 “EXPIRY DATE: *30 August 2043 (35 years after the grant of consents)*” and replacing with “EXPIRY DATE: *24 February 2046 (or such other date being 35 years after the commencement of the consents)*”.

DATED at Auckland this *24th* day of *February* 2011.



L J Newhook
Environment Judge





23 February 2016

Oceania Dairy Limited
Attn To: Shane Lodge
PO Box 891
Timaru 7940

Customer Services
P. 03 353 9007 or 0800 324 636

PO Box 345
Christchurch 8140

P. 03 365 3828
F. 03 365 3194
E. ecinfo@ecan.govt.nz

www.ecan.govt.nz

Dear Sir/Madam

NOTICE OF RESOURCE CONSENT DECISION(S)
RECORD NO: CRC164414
NAME: Oceania Dairy Limited

The decision of Environment Canterbury is to grant your application(s) on the terms and conditions specified in the attached resource consent document(s). Your resource consent(s) commences from the date of this letter advising you of the decision. The reasons for the decision are:

1. The proposed activity does not conflict with the purpose of the RM Act given the conditions.

For some activities a report is prepared, with officer recommendations, to provide information to the decision makers. If you require a copy of the report please contact our Customer Services section.

If you do not agree with the consent authority decision, you may object to the whole or any part. Notice of any objection must be in writing and lodged with Environment Canterbury within 15 working days of receipt of this decision.

Alternatively you may appeal to the Environment Court, PO Box 2069, Christchurch. The notice of appeal must be lodged with the Court within 15 working days of receipt of this decision, with a copy forwarded to Environment Canterbury within the same timeframe. If you appeal this decision, the commencement date will then be the date on which the decision on the appeal is determined. If you are in any doubt about the correct procedures, you should seek legal advice.

Environment Canterbury takes every measure to improve both applications and processes, and we appreciate your feedback as an important component in ensuring this occurs. You can complete a consents survey on-line at <http://www.ecan.govt.nz/services/resource-consents/pages/surveys.aspx>. Alternatively, you can call our Customer Services Section on 0800 EC INFO who will be happy to complete the survey with you.

Charges, set in accordance with section 36 of the Resource Management Act 1991, shall be paid to the Regional Council for the carrying out of its functions in relation to the administration, monitoring and supervision of resource consents and for the carrying out of its functions under section 35 of the Act.

Our Ref: CRC164414
Your Ref: EC132996,EC277465
Contact: Customer Services

Thank you for helping us make Canterbury a great place to live.

For all queries please contact our Customer Services Section by telephoning (03) 353 9007, 0800 ECINFO (0800 324 636), or email ecinfo@ecan.govt.nz quoting your CRC number above.

Yours sincerely

A handwritten signature in black ink, appearing to be 'N. Wilson'.

CONSENTS PLANNING SECTION

CC Address:

Babbage Consultants Ltd
Attn To: Nathaniel Wilson
PO Box 2027
Shortland Street
Auckland 1140

RESOURCE CONSENT CRC164414

Pursuant to Section 104 of the Resource Management Act 1991

The Canterbury Regional Council (known as Environment Canterbury)

GRANTS TO:	Oceania Dairy Limited
A DISCHARGE PERMIT:	to discharge contaminants in industrial wastewater to land
CHANGE TAKES EFFECT DATE:	23 Feb 2016
EXPIRY DATE:	19 Feb 2045
LOCATION:	30 Cooneys Road, Glenavy

SUBJECT TO THE FOLLOWING CONDITIONS:

Limits

- 1 The discharge shall be only:
 - a. Treated dairy factory wastewater (factory wastewater) from the washing down of trucks, equipment, tanks, factory surfaces and pipes in process areas, and from water treatment, which consists of water, milk and traces of nitric acid, hydrochloric acid, sulphuric acid, caustic soda, salt, lime and dairy sanitizers;
 - b. Condensate (clean wastewater) obtained from distilling water from milk and cooling water discharges.
- 2 The dairy factory shall be located on Lot 1 DP 424011, on the corner of Cooneys Road and State Highway 1, Glenavy, South Canterbury, as shown on Plan CRC141964A, which forms part of this consent.
- 3 The discharge shall be onto land as follows:
 - a. Factory wastewater shall be discharged onto land with legal description Lot 1 DP 4204011 and Lot 2 DP 4204011 and Parts CB32F/1274, at or about map reference Topo 50 CB19:4807-2902, as shown on plan CRC141964B, which forms part of this consent.
 - b. Clean wastewater may be discharged onto land at or about map reference Topo 50 CB19:4902-2891, shown as " Alternate Discharge area for Clean wastewater" (Alternate Discharge area) on Plan CRC141964B;
 - c. If clean wastewater is not discharged to the Alternate Discharge area, a maximum amount of 1500 cubic metres per day may be discharged to land along with the factory wastewater.
- 4 The discharge to land shall occur on:
 - a. Up to 316 hectares of pastoral and cropping land. The grass and crops from this land shall be mechanically harvested.
 - b. Land that is not grazed by animals nor used to feed out animals.

- 5 a. The monthly average daily volume of factory wastewater discharged shall not exceed 2,650 cubic metres per day.
- b. The maximum volume of factory wastewater discharged shall not exceed 836,470 cubic metres per year.
- 6 The maximum volume of clean wastewater discharged to land shall not exceed 1500 cubic metres per day.
- 7 At least 48 hours of storage shall be provided in two or more 2000 cubic metre wastewater holding tanks at peak production.
- 8 All sanitizers used in the dairy factory shall be bio-degradable.

Factory Wastewater Treatment

- 9 The factory wastewater shall be:
- a. Collected in a central sump;
- b. Pumped into one or more 2000 cubic metre above ground holding tanks;
- c. Combined with miscellaneous discharges from the plant, such as discharges from floor drains in process areas, and truck wash water; and
- d. Treated in a sequence of processes including balancing and buffering, acid dosed dissolved air flotation (DAF), and lime dosing,

Clean Wastewater Treatment

- 10 Clean wastewater shall be continuously monitored for conductivity, by means of an inductive conductivity probe, prior to discharge to the Alternate Discharge area.
- 11 Any clean wastewater with a conductivity greater than 250 microsiemens per centimetre ($\mu\text{S}/\text{cm}$), prior to discharge to the Alternate Discharge area, shall be irrigated onto land with the factory wastewater.

Discharge to Land

- 12 Factory wastewater shall be discharged to land by:
- a. Precision variable rate central pivot irrigators that have the capability to positively control the rate of discharge in each bank of nozzles along the length of the irrigator; and
- b. For areas of the wastewater irrigation plan area not able to be irrigated by the precision variable rate central pivot irrigators, by portable spray irrigators.
- 13 The consent holder shall take all practicable steps to:
- a. Avoid leakage from pipes and structures associated with the irrigation system; and
- b. Avoid the irrigation of wastewater onto impermeable surfaces and river or stream riparian strips.
- 14 Factory wastewater shall be irrigated:
- a. To pasture and crops at an application rate of not more than 14 millimetres per application with a return period of not less than seven days, or up to the equivalent wastewater loading over any seven consecutive days where lesser applications are made, and a monthly average of up to two millimetres per day.
- b. The application rates shall be exclusive of irrigation water and clean wastewater which may be combined with the factory wastewater during wastewater irrigation.

- c. There shall be no discharge of wastewater within 20 metres of a surface water body, well or bore that does not form part of the factory water supply or groundwater monitoring network, or in any other place or at such a rate that the discharge is likely to enter surface water or flow onto a neighbouring property.
 - d. There shall be no irrigation of wastewater onto soils that will result in soil saturation being exceeded.
 - e. Surface ponding factory wastewater shall be discharged at an application rate that
 - i. Minimises ponding on the ground;
 - ii. Prevents surface ponding of wastewater for more than 24 hours after disposal;
 - iii. Ensures ponding shall not exceed 22 millimetres in depth.
 - iv. Ensures there shall not be any runoff beyond the property boundary.
- 15 The annual nitrogen loading rates from all sources to the wastewater irrigation areas shall be based on an annual nutrient management plan and shall not exceed:
- a. 400 kilograms of total nitrogen per hectare in any period of twelve consecutive months; and
 - b. 133 kilograms of total nitrogen per hectare in any three consecutive months.
- 16 The areal loading rate of phosphorus from all sources to the wastewater irrigation area shall be based on an annual nutrient management plan and shall not exceed:
- a. 80 kilograms of total phosphorus per hectare in any period of 12 consecutive months; and
 - b. 30 kilograms of total phosphorus per hectare in any three consecutive months.
- 17 The sodium absorption ratio measured in compliance with condition (21) shall not exceed 10.
- 18 Clean wastewater shall be continuously monitored for conductivity in accordance with Condition (10). If the measured conductivity is less than 250 microsiemens per centimetre ($\mu\text{S}/\text{cm}$), clean wastewater may be discharged to the Alternate Discharge area.

Maintenance

- 19 The consent holder shall maintain and operate all structures and relevant equipment associated with the discharges to ensure compliance with the conditions of this consent.
- 20 The consent holder shall, at not more than ten day intervals, take a representative sample of the wastewater after treatment and prior to discharge to land and have the sample analysed for the following:
- a. Total biochemical oxygen demand (five day) [milligrams per litre] ($\text{BOD}_{5\text{day}}$) and Total Chemical Oxygen Demand [milligrams per litre](COD);
 - b. Total nitrogen [milligrams per litre];
 - c. Nitrate-nitrogen [milligrams per litre];
 - d. Total phosphorus [milligrams per litre];
 - e. Total suspended solids [milligrams per litre].

Advice note: Once a clear relationship between $\text{BOD}_{5\text{day}}$ and COD tests have been established the regular BOD testing under this condition may be reported as a derived value from the COD test result with the agreement of the Manager, RMA Compliance and Enforcement, Canterbury Regional Council.

- 21 The consent holder shall, at not more than 30 day intervals, take a representative 24 hour sample of the wastewater, after treatment and prior to discharge to land, and have the sample analysed for the following:
- a. pH
 - b. Total phosphorus [milligrams per litre];
 - c. Dissolved reactive phosphorus [milligrams per litre];
 - d. Total nitrogen [milligrams per litre];
 - e. Nitrate-nitrogen [milligrams per litre];
 - f. Sodium [milligrams per litre];
 - g. Calcium [milligrams per litre];
 - h. Potassium [milligrams per litre]
 - i. Magnesium [milligrams per litre];
 - j. Sodium absorption ratio;
 - k. Conductivity;
 - l. Total chemical oxygen demand [milligrams per litre].
- 22 The results of the analyses of the wastewater shall be provided to the Canterbury Regional Council, Attention: RMA Compliance and Enforcement Manager, on a monthly basis.
- Groundwater**
- 23 A control monitoring bore(s) shall be established near the up-gradient boundary of the factory wastewater irrigation area in terms of groundwater flow. Two further bores shall be established downgradient of the irrigation area. The monitoring bores shall be established prior to the exercise of this consent. The bores shall be screened to allow groundwater sampling at 12 metres below ground level
- 24 Subject to condition (26) of this consent, groundwater samples shall be taken concurrently from each monitoring bore established in accordance with Condition (23) no later than one month after the bore has been established. Thereafter water samples shall be taken from each bore concurrently at least once during the months of October, January, April and July for the duration of this consent.
- 25 Groundwater samples from all monitoring bores shall be analysed and reported for the following determinands:
- a. Nitrate-nitrogen [milligrams per litre]
 - b. Nitrite-nitrogen [milligrams per litre]
 - c. Sodium [milligrams per litre]
 - d. COD [milligrams per litre]
 - e. Total dissolved solids [milligrams per litre]
 - f. Dissolved reactive phosphorus [milligrams per litre]
 - g. Total Nitrogen [milligrams per litre]
 - h. Sulphate [milligrams per litre]
- 26 The consent holder shall use their best endeavours to obtain permission to collect water samples from the owners of a representative selection of domestic wells located within three kilometres of the application area in an arc from North to North East.
- a. The locations of the wells selected shall be forwarded to the Canterbury Regional Council, Attention: RMA Compliance and Enforcement Manager.
 - b. Water samples shall be taken from these wells in accordance with the frequency set out in Condition (24).

- 27 If the concentration of any determinand listed in Condition (25) in any downgradient monitoring bore exceeds the Guideline Value (GV) for aesthetic determinands or the Maximum Acceptable Value (MAV) for nitrate-nitrogen in the New Zealand Drinking Water Standards as a result of discharges authorised by this consent, the consent holder shall:
- a. Inform potentially affected well owners or users of the test results.
 - b. At the request of any affected well owners provide an alternative domestic water supply to those wells deemed not to comply with the standards.
 - c. In consultation with the Canterbury Regional Council remediate all affected wells requiring provision of an alternative potable water supply. The consent holder shall continue to provide an alternative potable water supply until the concentration of any determinand elevated by the consented activity drops below the relevant GV or MAV.
 - d. Ensure the monitoring frequency required under condition (24) shall be no greater than at monthly intervals.
 - e. Ensure the monitoring frequency only returns to three monthly interval, as per condition (24), following a three month period of results being less than 80 percent of the relevant GV or MAV.

Soil

- 28 The consent holder shall, within six months of the commencement of this consent, start sampling the upper 200 millimetres of soil in the irrigation area to determine soil conditions of a spatial and temporal nature.
- a. The samples shall be taken at least once in any period of twelve consecutive months during the months of July or October (or as otherwise agreed in consultation with the Canterbury Regional Council).
 - b. On each sampling occasion a minimum of three random soil samples of a known volume shall be taken from within the top 200 millimetres of each of the soil types that comprise the irrigation area. The samples shall be combined to form one representative sample for each soil type.
- 29 Each representative sample shall be identified as comprising each separate soil type, and shall be analysed as soon as possible to ensure the integrity of the sample, for the following determinands:
- a. Soil pH
 - b. Electrical conductivity
 - c. Soil density
 - d. Total phosphorus
 - e. Olsen Phosphorus (available phosphorus)
 - f. Total nitrogen
 - g. Nitrate-nitrogen
 - h. Anaerobically minerisable nitrogen
 - i. Exchangeable cations: calcium, magnesium, potassium and sodium
 - j. Cation Exchange Capacity
 - k. Aggregate stability
 - l. Base saturation
 - m. Exchangeable Sodium Percentage.
- 30 The results of the analyses shall be recorded and shall include the following information:
- a. The date and time the samples were taken;
 - b. The location where the samples were taken;
 - c. The date the analyses were undertaken;

- d. Identification and contact details of the laboratory undertaking the analyses;
- e. A summary of the methods used in the analyses.

- 31 A suitably qualified person shall undertake an interpretation of the results. The interpretative report shall account for the specific soil type and the context of the conditions of the receiving environment at the time the sampling was undertaken. The interpretation shall include spatial and temporal comparisons, including trends, of sample results, and where appropriate, explanations of inputs and formulae used, including explanations of the units used for each reported result.
- 32 A copy of the soil test results shall be retained and forwarded to the Canterbury Regional Council in accordance with Condition (39) of this consent.

Odour and Aerosol Dispersion

- 33 The discharge shall not result in odour or an aerosol dispersion which is noxious, offensive or objectionable beyond the property boundary.
- 34 The consent holder shall take all practicable measures to prevent the drift of aerosols beyond the boundary of the property on which this consent is exercised.
- 35 The consent holder shall keep a record of all odour and aerosol dispersion complaints received. The record shall include the following:
- a. Date and time;
 - b. Nature and location of the complaint;
 - c. Complainant's details;
 - d. Weather conditions at the time of the complaint;
 - e. Details of key operating parameters at the time of the complaint; and
 - f. Remedial action taken to prevent further incidents.
- 36 Complaints shall be reported to the Canterbury Regional Council, Attention: RMA Compliance and Enforcement Manager, within five working days and the record of odour complaints shall be made available to the Canterbury Regional Council on request.

Reporting

- 37 A record of the annual amount of nitrogen lost to water from the property where the discharge occurs, for the period from 1 July in one year to 30 June in the following year, calculated using the latest version of the OVERSEERTM nutrient model, shall be provided to the Canterbury Regional Council, Attention: RMA Compliance and Enforcement Manager by 31 August each year.
- 38 During the period of operation of the factory wastewater irrigation system the consent holder shall, for each irrigator, maintain a record of the daily volume of:
- a. Discharges into land by spray irrigation;
 - b. Discharges of factory wastewater onto land;
 - c. Discharges of clean wastewater onto land with factory wastewater; and
 - d. Discharges of clean wastewater onto the Alternate Discharge area, and
 - e. Soil moisture levels and drainage rates.
- 39 The consent holder shall supply to the Canterbury Regional Council, Attention: RMA Compliance and Enforcement Manager, a report on the exercise of this consent over each 12 month period. The report shall include the following records for each irrigation system:
- a. A summary of the total monthly discharge depths recorded in accordance with Condition (38) of this consent;

- b. Location of factory wastewater application, depth of application, and the nitrogen loading rate;
 - c. Analysis and interpretation of wastewater quality, soil monitoring and groundwater monitoring;
 - d. Proposals for mitigating any adverse effects found to be occurring;
 - e. Results of monitoring clean wastewater prior to discharge to the Alternate Discharge area and
 - f. A record of any complaints that are received relating to the irrigation of wastewater.
- 40 This report shall include an interpretation of the monitoring results undertaken by a competent person qualified to carry out such investigations.
- 41 All sampling required under this consent shall be undertaken by a competent person using the most appropriate scientifically recognised and current methods.
- a. All samples taken shall be analysed using the most appropriate scientifically recognised and current method by a laboratory that is accredited for that method of analysis by a nationally recognised accreditation authority such as International Accreditation New Zealand; or, where there is no laboratory in New Zealand with accreditation for such a method, by a laboratory that has accreditation for similar analyses.
 - b. For the purposes of this condition, accreditation must be by International Accreditation New Zealand (IANZ), or an equivalent accreditation organisation that has a Mutual Recognition Arrangement with IANZ.

Management Plans

- 42 At least two months prior to the first exercise of this consent, the consent holder shall prepare and forward to the Canterbury Regional Council, Attention: RMA Compliance and Enforcement Manager, an Environment Management Plan (EMP) for the operation of the wastewater irrigation area. The EMP shall include, but not be limited to details of procedures used to:
- a. Manage and report on soil moisture and factory wastewater irrigation application rates;
 - b. Manage soil fertility on the wastewater irrigation area;
 - c. Manage soil structure;
 - d. Manage and report on a nutrient budget for the operation of the wastewater irrigation area, including the nutrients in biosolids;
 - e. Manage wastewater discharge when irrigation is not possible because of weather; and
 - f. Ensure odour and aerosol dispersion do not create adverse effects beyond the property boundary.
- 43 The EMP shall be reviewed by the consent holder at least once annually for the purpose of addressing any issues relating to compliance with the conditions of this consent. The current plan shall be forwarded to the Canterbury Regional Council, Attention: RMA Compliance and Enforcement Manager, annually and prior to 31st May in any year

Administration

- 44 The lapsing date for the purposes of section 125 shall be 31 December 2018.

- 45 The Canterbury Regional Council may, once per year, on any of the last five working days of May or November, serve notice of its intention to review the conditions of this consent for the purposes of:
- a. Dealing with any adverse effect on the environment which may arise from the exercise of the consent and which it is appropriate to deal with at a later stage; or
 - b. Requiring the adoption of the best practicable option to remove or reduce any adverse effect on the environment.

Issued at Christchurch on 23 February 2016

Canterbury Regional Council




Population center and locality labels


Hydrographic feature labels


Parks, forests, and reserves labels

Road labels

 Territorial Authority Boundaries

 State highways (<1:250,000)

 State highways outside Canterbury

 Regional Boundaries

Disclaimer:

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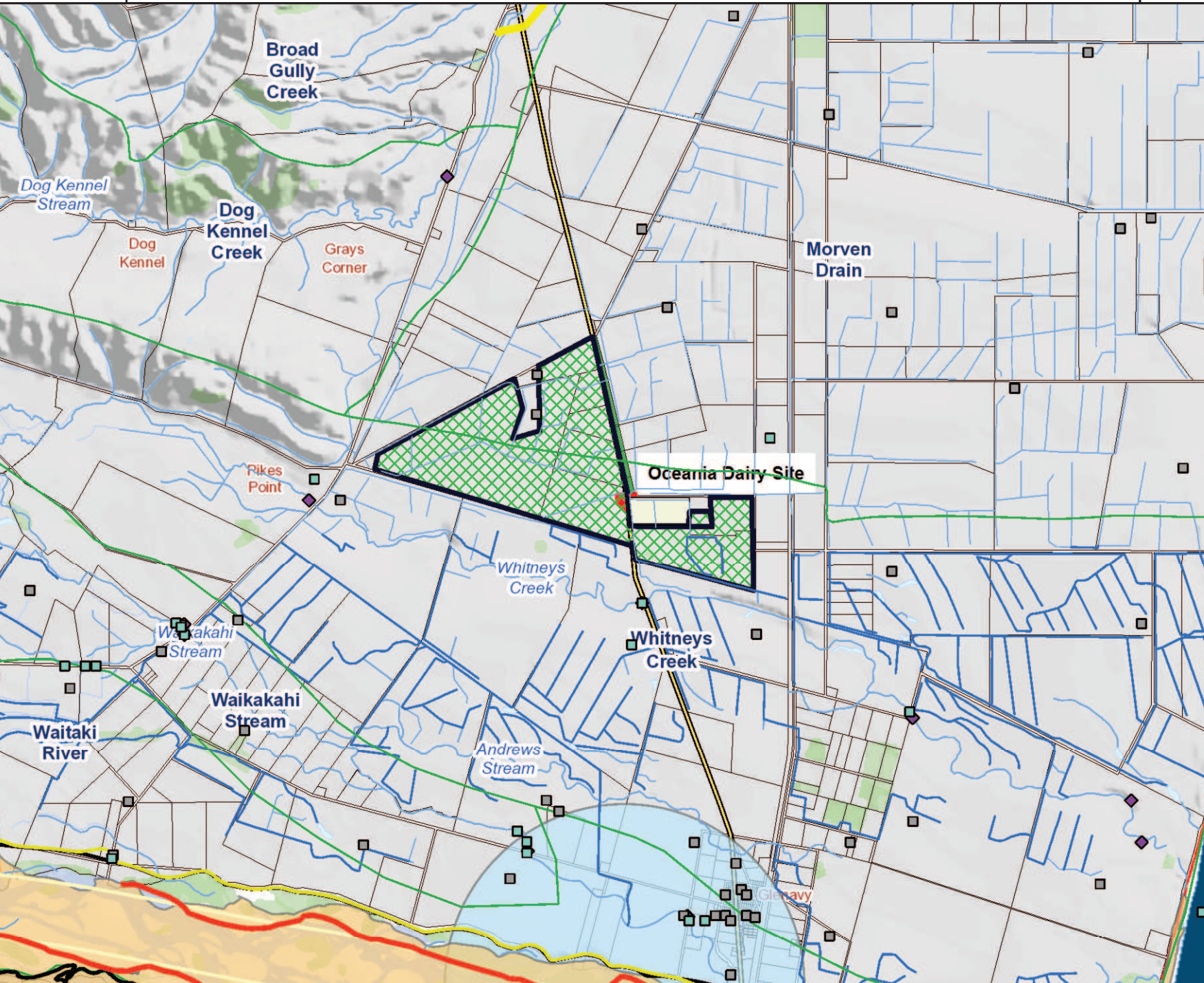
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Scale: 1:50,000 @A4

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16/10/2013 3:26:15 p.m.



RESOURCE CONSENT CRC174198

Pursuant to Section 104 of the Resource Management Act 1991

The Canterbury Regional Council (known as Environment Canterbury)

GRANTS TO: Oceania Dairy Limited

A DISCHARGE PERMIT (S15): To discharge of factory wastewater to farmland near Glenavy.

COMMENCEMENT DATE: 14 Mar 2017

EXPIRY DATE: 19 Feb 2045

LOCATION: Cnr McNaughtons Road and Old Ferry Road, Glenavy

SUBJECT TO THE FOLLOWING CONDITIONS:

Limits

- 1 The discharge shall be only:
 - a. Treated dairy factory wastewater (factory wastewater) from the washing down of trucks, equipment, tanks, factory surfaces and pipes in process areas and from water treatment, which consists of water, milk and traces of nitric acid, hydrochloric acid, sulphuric acid, caustic soda, salt, lime and dairy sanitizers; and/or
 - b. Condensate (clean wastewater), obtained from distilling water from milk, and cooling water discharges.
- 2 Factory wastewater shall be discharged onto land with legal description Lot 1 DP 304049, RS 22589, and RS 24278, at or about map reference NZTopo 50 CB19:4706-2969, as shown on Plan CRC174198A, which forms part of this consent.
- 3 The discharge to land shall occur on:
 - a. Up to 90 hectares of pastoral and cropping land; and/or
 - b. Land that is grazed by animals.
- 4
 - a. The monthly average daily volume of factory wastewater discharged for consent CRC174198 in combination with consent CRC164414 shall not exceed 2,650 cubic metres per day.
 - b. The maximum volume of factory wastewater discharged under consent CRC174198 in combination with CRC164414 shall not exceed 836,470 cubic metres per year.

Factory Wastewater Treatment

- 5 The factory wastewater shall be:
 - a. Collected in a central sump;
 - b. Pumped into one or more 2000 cubic metre above ground holding tanks;

- c. Combined with miscellaneous discharges from the plant, such as discharges from floor drains in process areas, and truck wash water; and
- d. Treated in a sequence of processes including balancing and buffering, acid dosed dissolved air flotation (DAF), and lime dosing.

Clean Wastewater

- 6 Any clean wastewater irrigated onto the irrigation area shown on Plan CRC174198A shall have a conductivity of less than 250 microsiemens per centimetre ($\mu\text{S}/\text{cm}$).

Discharge to Land

- 7 Factory wastewater shall be discharged to land by:
 - a. Precision variable rate central pivot irrigators that have the capability to positively control the rate of discharge in each bank of nozzles along the length of the irrigator; and
 - b. By portable spray irrigators for areas of the wastewater irrigation plan area not able to be irrigated by the precision variable rate central pivot irrigators.
- 8 The consent holder shall take all practicable steps to:
 - a. Avoid leakage from pipes and structures associated with the irrigation system; and
 - b. Avoid the irrigation of wastewater onto impermeable surfaces and river or stream riparian strips.
- 9 Factory wastewater shall be irrigated:
 - a. To pasture and crops at an application rate of not more than 14 millimetres per application with a return period of not less than seven days, or up to the equivalent wastewater loading over any seven consecutive days where lesser applications are made, and a monthly average of up to two millimetres per day.
 - b. The application rates shall be exclusive of irrigation water and clean wastewater which may be combined with the factory wastewater during wastewater irrigation.
 - c. There shall be no discharge of wastewater within 20 metres of a surface water body, well or bore that does not form part of the factory water supply or groundwater monitoring network, or in any other place or at such a rate that the discharge is likely to enter surface water or flow onto a neighbouring property.
 - d. There shall be no irrigation of wastewater onto soils that will result in soil saturation being exceeded.
 - e. Surface ponding factory wastewater shall be discharged at an application rate that:
 - i. Minimises ponding on the ground;
 - ii. Prevents surface ponding of wastewater for more than 24 hours after disposal;

- iii. Ensures ponding shall not exceed 22 millimetres in depth;
 - iv. Ensures there shall not be any runoff beyond the property boundary.
- 10 The annual nitrogen loading rates from all wastewater sources to the wastewater irrigation areas shall be based on an annual nutrient management plan and shall not exceed:
- a. 150 kilograms of total nitrogen per hectare in any period of twelve consecutive months if animals are grazed on the site; and
 - b. 300 kilograms of total nitrogen per hectare in any period of twelve consecutive months if the site is used to grow feed crops (cut and carry) and no animals are grazed on-site.
- 11 The three-month rolling average sodium absorption ratio measured in wastewater shall not exceed 7.0.
- 12 The discharge of industrial wastewater and cleanwater to land via irrigation for the purposes of farming shall meet a nitrogen discharge limit of:
- a. The Nitrogen Baseline loss rate; and
 - b. From 1 January 2020, the Baseline GMP Loss Rate.

Definitions:

The Nitrogen Baseline means the discharge of nitrogen below the root zone as modelled with the current version of OVERSEER® (or an equivalent model approved by the Chief Executive of Environment Canterbury) as represented by the Nitrogen Baseline OVERSEER® input files provided with the application, which was 62 kg N/ha/yr, when calculated using Overseer version 6.2.3.

The Baseline GMP Loss Rate means the average nitrogen loss rate below the root zone, as estimated by the Environment Canterbury Online Farm Portal, for the farming activity represented by the Nitrogen Baseline OVERSEER® input files provided with the application if operated at Good Management Practice. If the Baseline GMP Loss Rate cannot be generated by the Environment Canterbury Online Farm Portal it means the Nitrogen Baseline.

The Nitrogen Baseline OVERSEER® input files reflect clause A of the Nitrogen Baseline definition, as defined below, and were inputted into the model in accordance with the OVERSEER® Best Practice Data Input Standards. They can be updated to reflect the current Overseer Best Practice Data Input Standards, but must still describe the same activity.

Clause A: “the discharge of nitrogen below the root zone, as modelled with OVERSEER®, (where the required data is inputted into the model in accordance with OVERSEER® Best Practice Data Input Standards), or an equivalent model approved by the Chief Executive of Environment Canterbury, averaged over a 48 month consecutive period in the years of the period of 2009 – 2013 inclusive, and expressed in kg per hectare per annum, except in relation to Rules 5.46 and 5.62 where it is expressed as a total kg per annum from the identified area of land”

Maintenance

- 13 The consent holder shall maintain and operate all structures and relevant equipment associated with the discharges to ensure compliance with the conditions of this consent.

Monitoring

- 14 The consent holder shall, at not more than ten day intervals, take a representative sample of the wastewater after treatment and prior to discharge to land and have the sample analysed for the following:
- a. Total biochemical oxygen demand (five day) (milligrams per litre) (BOD_{5day}) and Total Chemical Oxygen Demand (milligrams per litre)(COD);
 - b. Total nitrogen (milligrams per litre);
 - c. Nitrate-nitrogen (milligrams per litre);
 - d. Total phosphorus (milligrams per litre); and
 - e. Total suspended solids (milligrams per litre).

Advice note: Once a clear relationship between BOD_{5day} and COD tests have been established the regular BOD testing under this condition may be reported as a derived value from the COD test result with the agreement of the Regional Leader – Monitoring and Compliance, Canterbury Regional Council.

- 15 The consent holder shall, at not more than 30 day intervals, take a representative 24 hour sample of the wastewater, after treatment and prior to discharge to land, and have the sample analysed for the following:
- a. pH
 - b. Total phosphorus (milligrams per litre);
 - c. Dissolved reactive phosphorus (milligrams per litre);
 - d. Total nitrogen (milligrams per litre);
 - e. Nitrate-nitrogen (milligrams per litre);
 - f. Sodium (milligrams per litre);
 - g. Calcium (milligrams per litre);
 - h. Potassium (milligrams per litre);
 - i. Magnesium (milligrams per litre);
 - j. Sodium absorption ratio;
 - k. Conductivity (microsiemens per centimetre); and
 - l. Total chemical oxygen demand (milligrams per litre).

- 16 The results of the analyses of the wastewater shall be provided to the Canterbury Regional Council, Attention: Regional Leader – Monitoring and Compliance, on a monthly basis.

Groundwater

- 17 Groundwater samples shall be taken concurrently from monitoring bores PZ5, PZ6, PZ7 and PZ9 at least once during the months of October, January, April and July for the duration of this consent.
- 18 Groundwater samples from monitoring bores PZ5, PZ6, PZ7 and PZ9 shall be analysed and reported for the following determinands:

- a. E. coli;
 - b. pH;
 - c. Dissolved reactive phosphorus;
 - d. Total nitrogen;
 - e. Nitrite-nitrogen;
 - f. Nitrate-nitrogen;
 - g. Sodium;
 - h. Calcium;
 - i. Potassium;
 - j. Magnesium;
 - k. Chloride;
 - l. Sulphate;
 - m. Conductivity;
 - n. Total dissolved solids; and
 - o. Total chemical oxygen demand.
- 19 The consent holder shall use their best endeavours to obtain permission to collect water samples from the owners of a representative selection of domestic wells located within three kilometres of the application area in an arc from North to North East.
- a. The locations of the wells selected shall be forwarded to the Canterbury Regional Council, Attention: Regional Leader – Monitoring and Compliance.
 - b. Water samples shall be taken from these wells in accordance with the frequency set out in Condition (17).
- 20 If the concentration of any determinand listed in Condition (18) in any downgradient monitoring bore exceeds the Guideline Value (GV) or the Maximum Acceptable Value (MAV) for in the New Zealand Drinking Water Standards as a result of discharges authorised by this consent, the consent holder shall:
- a. Inform potentially affected well owners or users of the test results;
 - b. At the request of any affected well owners, provide an alternative domestic water supply to those wells deemed not to comply with the standards;
 - c. In consultation with the Canterbury Regional Council, remediate all affected wells requiring provision of an alternative potable water supply. The consent holder shall continue to provide an alternative potable water supply until the concentration of any determinand elevated by the consented activity drops below the relevant GV or MAV;
 - d. Ensure the monitoring frequency required under Condition (17) shall be no greater than at monthly intervals;
 - e. Ensure the monitoring frequency only returns to three monthly intervals, as per Condition (17), following a three month period of results being less than 80 percent of the relevant GV or MAV.
- Soil**
- 21 The consent holder shall, within six months of the commencement of this consent, start sampling the upper 200 millimetres of soil in the irrigation area to determine soil conditions of a spatial and temporal nature.

- a. The samples shall be taken at least once in any period of twelve consecutive months during the months of July or October.
 - b. On each sampling occasion, a minimum of one random soil sample of a known volume shall be taken from within the top 200 millimetres of each of the soil types that comprise the irrigation area.
- 22 Each representative sample shall be identified as comprising each separate soil type, and shall be analysed as soon as possible to ensure the integrity of the sample, for the following determinands:
- a. Soil pH;
 - b. Electrical conductivity;
 - c. Soil density;
 - d. Total phosphorus;
 - e. Dissolved reactive phosphorus;
 - f. Total nitrogen;
 - g. Nitrate-nitrogen;
 - h. Anaerobically minerisable nitrogen;
 - i. Exchangeable cations: calcium, magnesium, potassium and sodium;
 - j. Cation Exchange Capacity;
 - k. Aggregate stability;
 - l. Base saturation; and
 - m. Exchangeable Sodium Percentage.
- 23 The results of the analyses shall be recorded and shall include the following information:
- a. The date and time the samples were taken;
 - b. The location where the samples were taken;
 - c. The date the analyses were undertaken;
 - d. Identification and contact details of the laboratory undertaking the analyses; and
 - e. A summary of the methods used in the analyses.
- 24 A suitably qualified person shall undertake an interpretation of the results. The interpretative report shall account for the specific soil type and the context of the conditions of the receiving environment at the time the sampling was undertaken. The interpretation shall include spatial and temporal comparisons, including trends, of sample results, and where appropriate, explanations of inputs and formulae used, including explanations of the units used for each reported result.
- 25 A copy of the soil test results shall be retained and forwarded to the Canterbury Regional Council in accordance with Condition (28) of this consent.

Reporting

- 26
- a. A record of the annual amount of nitrogen lost to water from the property where the discharge occurs, for the period from 1 July in one year to 30 June in the following year, calculated using the latest version of the OVERSEERTM nutrient model, shall be provided to the Canterbury Regional Council, Attention: Regional Leader – Monitoring and Compliance by 31 August each year.

- b. This record shall indicate the amount of nitrogen lost from the part of the property within the Whitneys Creek sub-area and the amount of nitrogen lost from the part of the property within the Morven-Sinclair sub-area separately.
- 27 The consent holder shall, for each irrigator used to apply factory wastewater to land, maintain a record of the daily volume of:
 - a. Discharges into land by spray irrigation;
 - b. Discharges of factory wastewater onto land;
 - c. Discharges of clean wastewater onto land with factory wastewater; and
 - d. If practicable, soil moisture levels and drainage rates.
- 28 The consent holder shall supply to the Canterbury Regional Council, Attention: Regional Leader – Monitoring and Compliance, a report on the exercise of this consent over each 12 month period. The report shall include the following records for each irrigation system:
 - a. A summary of the total monthly discharge depths recorded in accordance with Condition (27) of this consent;
 - b. Location of factory wastewater application, depth of application, and the nitrogen loading rate;
 - c. Analysis and interpretation of wastewater quality, soil monitoring and groundwater monitoring;
 - d. Proposals for mitigating any adverse effects found to be occurring; and
 - e. A record of any complaints that are received relating to the irrigation of wastewater.
- 29 This report shall include an interpretation of the monitoring results undertaken by a competent person qualified to carry out such investigations.
- 30 All sampling required under this consent shall be undertaken by a competent person using the most appropriate scientifically recognised and current methods.
 - a. All samples taken shall be analysed using the most appropriate scientifically recognised and current method by a laboratory that is accredited for that method of analysis by a nationally recognised accreditation authority such as International Accreditation New Zealand; or, where there is no laboratory in New Zealand with accreditation for such a method, by a laboratory that has accreditation for similar analyses.
 - b. For the purposes of this condition, accreditation must be by International Accreditation New Zealand (IANZ), or an equivalent accreditation organisation that has a Mutual Recognition Arrangement with IANZ.

Administration

- 31 The lapsing date for the purposes of section 125 shall be 31 March 2020.
- 32 The Canterbury Regional Council may, once per year, on any of the last five working days of May or November, serve notice of its intention to review the conditions of this consent for the purposes of:

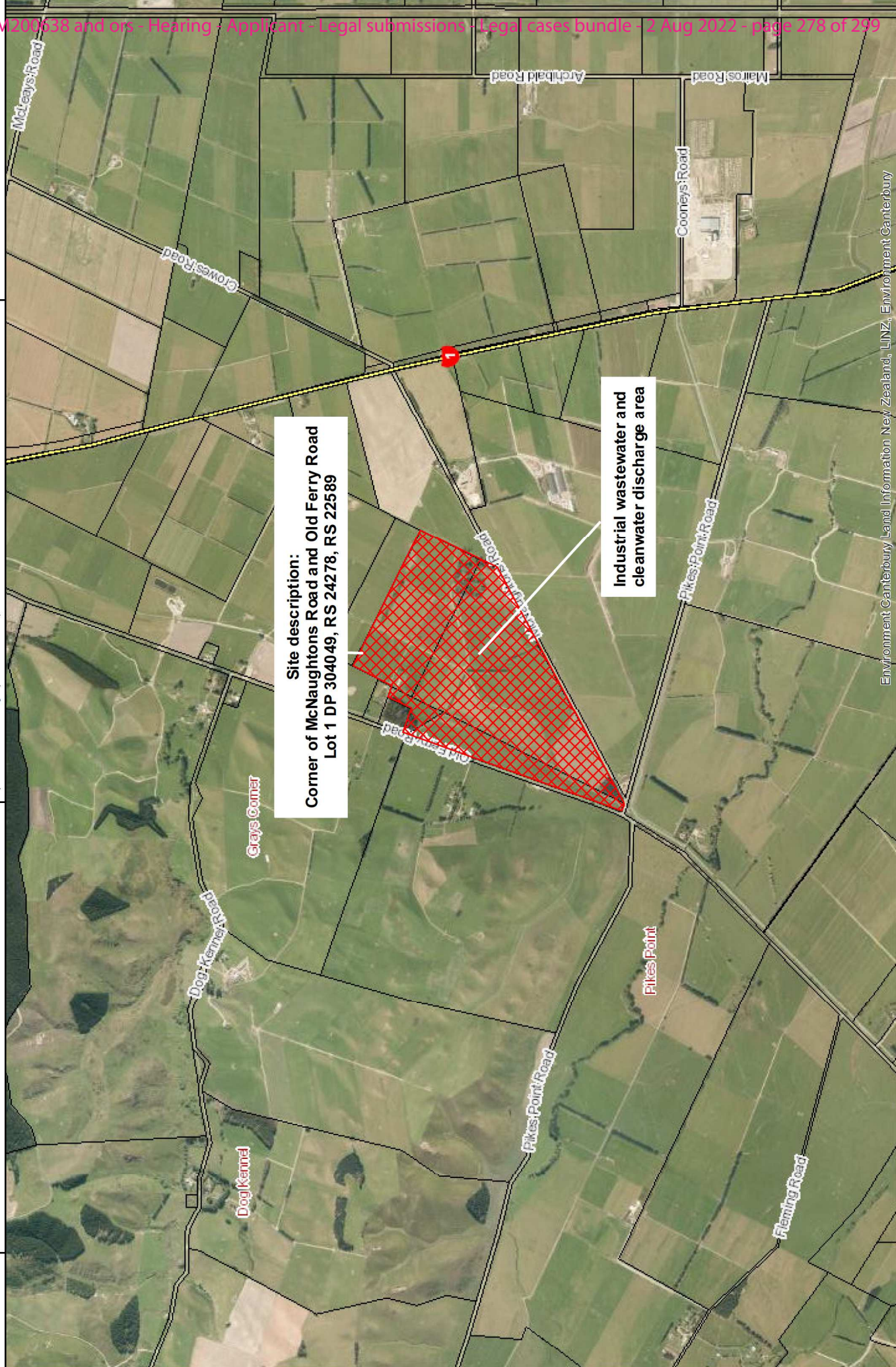
- a. Dealing with any adverse effect on the environment which may arise from the exercise of the consent and which it is appropriate to deal with at a later stage; or
- b. Requiring the adoption of the best practicable option to remove or reduce any adverse effect on the environment.

Issued at Christchurch on 14 March 2017

Canterbury Regional Council

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Map Created by Environment Canterbury on
Scale: 1:25,000 @A4
0 0.25 0.5 0.75 1
Kilometres



Site description:
Corner of McNaughtons Road and Old Ferry Road
Lot 1 DP 304049, RS 24278, RS 22589

Industrial wastewater and cleanwater discharge area

Exercising of resource consent CRC174198

It is important that you notify Environment Canterbury when you first start using your consent.

GRANTED TO:	Oceania Dairy Limited
A DISCHARGE PERMIT (S15):	To discharge of factory wastewater to farmland near Glenavy
LOCATION:	Cnr McNaughtons Road and Old Ferry Road, Glenavy

Even if the consent is replacing a previous consent for the same activity, you need to complete and return this page.

Providing this information will:

- Validate your consent through to its expiry date
- Minimise compliance monitoring charges
- Help provide an accurate picture of the state of the environment.

If consent CRC174198 is not used before 31 Mar 2020 this consent will lapse and no longer be valid.

Declaration:

I have started using this resource consent.

Action taken: (e.g. pasture irrigated, discharge from septic tank/boiler/spray booth etc).

Approximate start date (*Note: this may be different to the date the consent was granted*): _____

Signed: _____ **Date:** _____

Full name of person signing (please print): _____

Please return to:

Environmental Protection - Administration
 Environment Canterbury
 PO Box 345
 Christchurch 8140

File: CRC174198

10 September 2013

Synlait Milk Limited
Attn To: Lucy Johnson
1028 Heslerton Road
RD 13
Rakaia 7783



Customer Services
P. 03 353 9007 or 0800 324 636

PO Box 345
Christchurch 8140

P. 03 365 3828
F. 03 365 3194
E. ecinfo@ecan.govt.nz
www.ecan.govt.nz

Dear Sir/Madam

NOTICE OF RESOURCE CONSENT DECISION(S)

RECORD NO: CRC141274
NAME: Synlait Milk Limited

The decision of Environment Canterbury is to grant your application(s) on the terms and conditions specified in the attached resource consent document(s). Your resource consent(s) commences from the date of this letter advising you of the decision. The reasons for the decision are:

1. Any adverse effects on the environment as a result of the change in conditions will be minor.

For some activities a report is prepared, with officer recommendations, to provide information to the decision makers. If you require a copy of the report please contact our Customer Services section.

If you do not agree with the consent authority decision, you may object to the whole or any part. Notice of any objection must be in writing and lodged with Environment Canterbury within 15 working days of receipt of this decision.

Alternatively you may appeal to the Environment Court, PO Box 2069, Christchurch. The notice of appeal must be lodged with the Court within 15 working days of receipt of this decision, with a copy forwarded to Environment Canterbury within the same timeframe. If you appeal this decision, the commencement date will then be the date on which the decision on the appeal is determined. If you are in any doubt about the correct procedures, you should seek legal advice.

Environment Canterbury takes every measure to improve both applications and processes, and we appreciate your feedback as an important component in ensuring this occurs. You can complete a consents survey on-line at <http://www.ecan.govt.nz/services/resource-consents/pages/surveys.aspx>. Alternatively, you can call our Customer Services Section on 0800 EC INFO who will be happy to complete the survey with you.

Charges, set in accordance with section 36 of the Resource Management Act 1991, shall be paid to the Regional Council for the carrying out of its functions in relation to the administration, monitoring and supervision of resource consents and for the carrying out of its functions under section 35 of the Act.

Our Ref: CRC141274
Your Ref: EC103128
Contact: Customer Services

Thank you for helping us make Canterbury a great place to live.

For all queries please contact our Customer Services Section by telephoning (03) 353 9007, 0800 ECINFO (0800 324 636), or email ecinfo@ecan.govt.nz quoting your CRC number above.

Yours sincerely

A handwritten signature in black ink, appearing to be 'J. S.', written in a cursive style.

CONSENTS PLANNING SECTION

RESOURCE CONSENT CRC141274

Pursuant to Section 104 of the Resource Management Act 1991

The Canterbury Regional Council (known as Environment Canterbury)

GRANTS TO:	Synlait Milk Limited
A DISCHARGE PERMIT:	To discharge contaminants onto land and into air.
CHANGE TAKES EFFECT DATE:	10 Sep 2013
EXPIRY DATE:	28 Aug 2043
LOCATION:	Heslerton Road, DUNSANDEL

SUBJECT TO THE FOLLOWING CONDITIONS:

- 1
 - a. The discharges shall be only:
 - i. diluted dairy effluent (the "Diluted Discharge") and solid dairy effluent (the "Solid Discharge") originating from the dairy sheds and other stockholding areas;
 - ii. odour arising from diluted dairy effluent and solid dairy effluent stored in the effluent storage facilities located at or about Topo 50 BX22:3186-6107 and Topo 50 BX22:3045-6223 as shown on Plan CRC141274, which forms part of this consent.
 - b. For the purposes of this consent "Diluted Discharge" is defined as:
 - i. liquid dairy effluent derived from a dairy shed or other stockholding area diluted with washdown water; and
 - ii. cleaning compounds within the washdown water which at the time of use have been approved by the New Zealand Food Safety Authority or its successor for use in dairy sheds;
 - iii. residual raw milk; and
 - iv. stormwater from the dairy shed yards or other stockholding area.
- 2 The dairy sheds and stockholding areas shall be located as shown on Plan CRC141274.
- 3
 - a. The Diluted Discharge shall only be onto the area identified on Plan CRC141274 as the "Diluted Effluent Discharge Area".
 - b. The Solid Discharge shall only be onto the area identified on Plan CRC141274 as the "Solid Effluent Discharge Area".

DILUTED DISCHARGE

- 4 The discharge shall only be via a spray irrigation system.

- 5
- a. If the irrigation system used to distribute the discharge is also used to distribute water, a backflow preventer manufactured in accordance with AS 2845.1 (1998) or an equivalent standard, shall be installed within the pump outlet plumbing or within the mainline, to prevent the backflow of water or contaminants into the bore.
 - b. Any backflow preventer, referred to in condition (5)(a), shall be tested to the standard set out in AS 2845.3 (1993) or an equivalent standard within one month of its installation and annually thereafter by a suitably qualified person. A test report shall be provided to the Canterbury Regional Council, Attention: RMA Compliance and Enforcement Manager, within two weeks of each inspection.

- 6
- The discharge application depth, including any irrigation water applied with the discharge or within 24 hours before or after discharging:
- (a) shall not exceed 24 millimetres per day; and
 - (b) shall not result in any runoff beyond the property boundary.

- 7
- There shall be no pools of effluent on the land surface two hours after the discharge occurs.

DILUTED DISCHARGE AND SOLID DISCHARGE

- 8
- The discharge shall not exceed a rate of:
- (a) 200 kilograms of nitrogen per hectare per year onto any part of the Diluted Effluent Discharge Area or the Solid Effluent Discharge Area; and
 - (b) 100 kilograms of nitrogen per hectare within any consecutive three month period.
- 9
- a. There shall be no discharge within 20 metres of any bore, soakhole, surface water body or artificial watercourse.
 - b. There shall be no discharge such that the discharge is likely to run-off and enter groundwater, any surface water body or any artificial watercourse.
 - c. There shall be no discharge into surface water as a consequence of the exercise of this consent.
- 10
- There shall be no discharge onto frozen ground or snow-covered ground.
- 11
- The discharge shall be managed to ensure that aerosols and spray-drift arising from the application of the discharge onto land are contained within the boundary of the Diluted Effluent Discharge Area.
- 12
- The discharge of contaminants to air from the storage facilities and the "Diluted Discharge" and "Solid Discharge" shall not result in offensive or objectionable odour beyond the property boundary.
- 13
- a. The consent holder shall manage their operation in accordance with the Management Plan to ensure the conditions of this consent are complied with at all times.
 - b. Prior to any change in the activity authorised by this consent occurring, the Management Plan shall be updated and shall be supplied to the Canterbury Regional Council, Attention: RMA Compliance and Enforcement Manager.
 - c. A copy of the Management Plan shall be given to all persons undertaking activities authorised by this consent.

- 14 This consent shall not be used in conjunction with any other discharge of dairy effluent occurring onto the Diluted Effluent Discharge Area.
- 15 A copy of this resource consent shall be positioned in a prominent place in the dairy shed at all times.
- 16 The Canterbury Regional Council may, once per year, on any of the last five working days of March, June or November, serve notice of its intention to review the conditions of this consent for the purposes of:
 - (a) dealing with any adverse effect on the environment which may arise from the exercise of this consent and which it is appropriate to deal with at a later stage; or
 - (b) requiring the adoption of the best practicable option to remove or reduce any adverse effect on the environment.
- 17 The lapsing date for the purposes of section 125 shall be 30 September 2013.
- 18 The effluent storage facilities on the property shall provide a minimum working capacity of 3,400 cubic metres and which shall be maintained for the duration of this consent. For the purpose of this consent, 'minimum working capacity' is defined as the capacity available for storing diluted dairy effluent, but excludes stonetrap, settling ponds, a minimum 300 millimetre vertical free-board and unpumpable sludge at the base of the pond(s).

Issued at Christchurch on 10 September 2013

Canterbury Regional Council

Consent No: CRC141274

Exercising of resource consent

It is important that you notify Environment Canterbury when you first start using your consent.

GRANTED TO: Synlait Milk Limited
A DISCHARGE PERMIT: To discharge contaminants onto land and into air.
LOCATION: Heslerton Road, DUNSANDEL

Even if the consent is replacing a previous consent for the same activity, you need to complete and return this page.

Providing this information will:

- Validate your consent through to its expiry date
- Minimise compliance monitoring charges
- Help provide an accurate picture of the state of the environment.

If consent CRC141274 is not used before 30 Sep 2018 this consent will lapse and no longer be valid.

Declaration:

I have started using this resource consent.

Action taken: (e.g. pasture irrigated, discharge from septic tank/boiler/spray booth etc).

Approximate start date (*Note: this may be different to the date the consent was granted*): _____

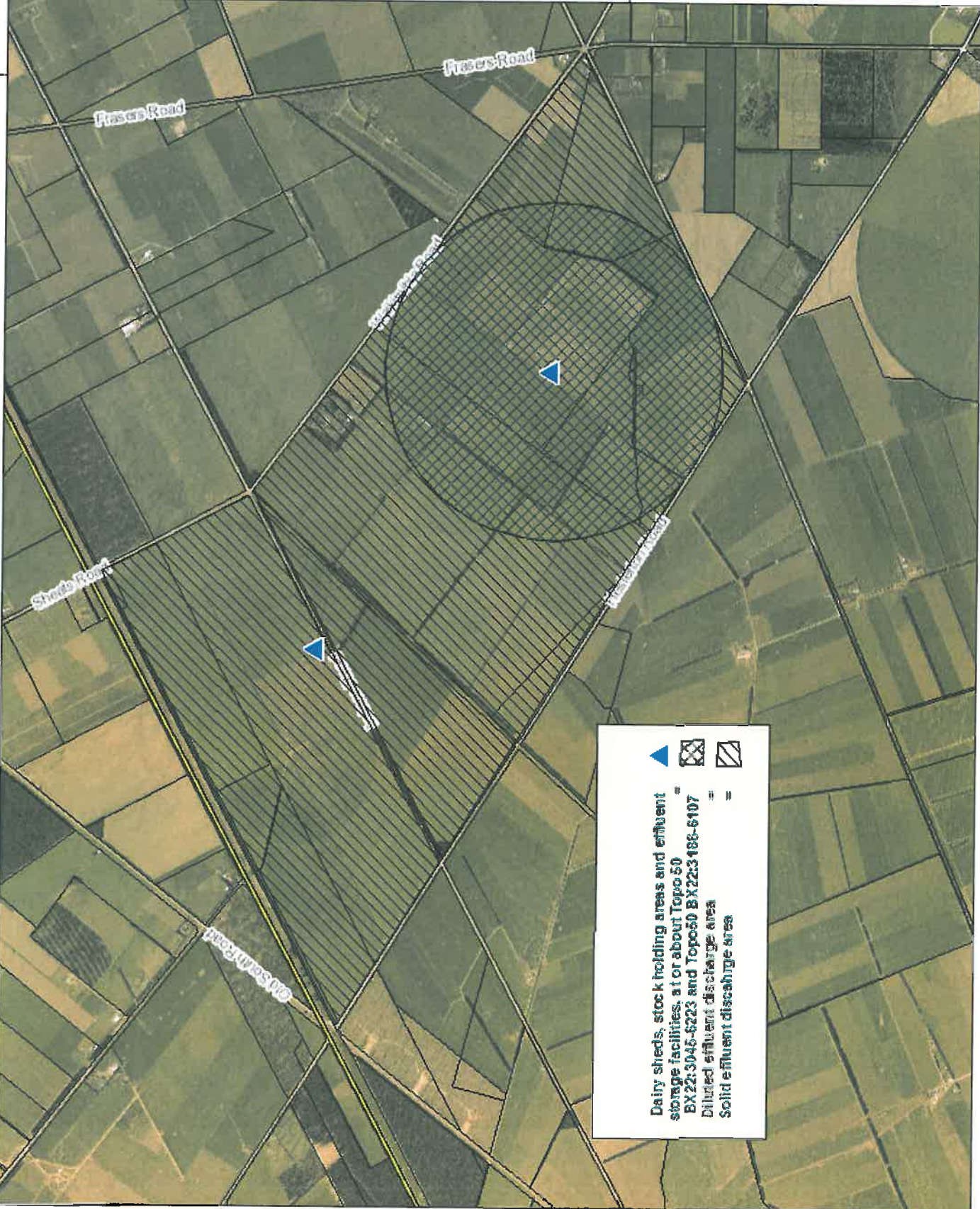
Signed: _____ **Date:** _____




Full name of person signing (please print): _____






Please return to:

Environmental Protection - Administration
 Environment Canterbury
 PO Box 345
 Christchurch 8140

Plan CRC141274



 Dairy sheds, stock holding areas and effluent storage facilities, at or about Topo 50 BX 22:3046-6223 and Topo 60 BX 22:3188-6107
 Diluted effluent discharge area
 Solid effluent discharge area

- Population center and locality labels
- Hydrographic feature labels
- Parks, forests, and reserves labels
- Road labels
-  Regional Boundaries
-  Territorial Authority Boundaries
-  State highways (<1:250,000)
-  Land Parcels
-  State highways outside Canterbury

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 Map Created by Sam Beaumont on 21/08/2013 2:47:35 p.m.

AUTH-20211372



Cnr North Road and Price Street
(Private Bag 90116
DX YX20175)
Invercargill

Telephone (03) 211 5115
Fax No. (03) 211 5252
Southland Freephone No. 0800 76 88 45

Discharge Permit

Under Section 104B of the Resource Management Act 1991, a resource consent is granted by the Southland Regional Council to **Prime Range Meats Limited** of **1 Sussex Street, West Plains, 9874** from **10 December 2021**.

Please read this Consent carefully, and ensure that any staff or contractors carrying out activities under this Consent on your behalf are aware of all the conditions of the Consent.

Details of Permit

Purpose for which permit is granted:	To discharge dewatered meatworks wastewater treatment sludge to land by muck spreader
Location	1623 and 1964 Wyndham Mokoreta Road and 100 Boundary Creek Road
- site locality	
- map reference	NZTM2000 1293988E 4855404N
- physiographic zone	Bedrock/Hill Country and Oxidising
- groundwater zone	Outside of Zones
- catchment	Mokoreta River, Redan Stream and Boundary Creek
- FMU	Mataura
Legal description of land at the site:	Lot 1 DP 734, Lot 1 DP 7766, Part Section 7 Block I Mokoreta SD, Part Section 8 Block I Mokoreta SD, Part Section 9 Block I Mokoreta SD, Part Section 10 Block I Mokoreta SD, Part Section 11 Block I Mokoreta SD, Part Section 13 Block I Mokoreta SD, Part Section 22 Block I Mokoreta SD, Part Section 29 Block I Mokoreta SD, Part Section 30 Block I Mokoreta SD, Part Section 32 Block I Mokoreta SD, Part Section 33 Block I Mokoreta SD, Part Section 34 Block I Mokoreta SD, Part Section 38 Block I Mokoreta SD, Part Section 39 Block I Mokoreta SD.
Expiry date:	10 December 2046

Schedule of Conditions

General conditions

1. This consent authorises the discharge of dewatered meatworks wastewater treatment sludge ("biosolids") onto land at 1623 and 1964 Wyndham Mokoreta Road and 100 Boundary Creek Road owned by Prime Range Farm Management Limited. The activity shall be undertaken in accordance with:
 - (a) the Resource Consent Application (APP-20211372)¹ dated 2 July 2021 and further information² dated 4 October 2021; and
 - (b) the Biosolids Management Plan.

Advice Note: Routine monitoring inspections of this consent may occur up 2 times a year. This number does not include any other required inspections.

2. Where there is inconsistency between the application for resource consent, the Biosolids Management Plan and the conditions of this consent, the conditions of this consent shall prevail.
3. The Consent Holder shall notify the Consent Authority the identity of the Person in Charge of the biosolid discharge system:
 - (a) prior to the first exercise of this consent, and
 - (b) no more than five working days following the appointment of any new Person in Charge.

Compliance Limits

4. No discharge shall occur within:
 - (a) 20 metres of any surface watercourse, including ephemeral waterways and natural wetlands;
 - (b) 100 metres of any potable water abstraction point;
 - (c) 200 metres of any place of assembly or residential dwelling not on the subject property; and
 - (d) 20 metres from any property boundaries.

Where there is inconsistency between the discharge plan attached as Appendix 1 and the conditions of this consent, the conditions of this consent shall prevail.

5. Biosolids discharged to land shall:
 - (a) be at a loading rate not greater than the plant available nitrogen (PAN) rate of 50 kg PAN/ha in any one application; and
 - (b) not cause the annual PAN loading rate to any area to exceed the annual PAN loading rate of 150kg N/ha/year.
6. The following mineralisation rates of the waste activated sludge organic nitrogen content of biosolids shall apply, unless otherwise agreed upon in writing to the Consent Authority:
 - (a) 30% mineralisation in year 1;
 - (b) 15% mineralisation in year 2; and
 - (c) 8 % mineralisation in year 3.

¹ Environment Southland Document ID A668986

² Environment Southland Document ID A702025

7. Phosphorus loading onto any land area as a result of the exercise of this consent shall not exceed 100kg P/ha/year.

Management

8. The biosolids shall be discharged as evenly as possible.
9. The stored or discharged biosolids shall not enter any surface watercourse in any way, including:
 - (a) directly;
 - (b) indirectly;
 - (c) by overland flow;
 - (d) via entrainment by stormwater or run-off; or
 - (e) via a pipe.
10. The Consent Holder shall not discharge biosolids to land if:
 - (a) there has been a weather forecast by the Meteorological Service of New Zealand Limited (MetService) predicting 25mm or more of rain within the next 24 hours for the Southland or Clutha Regions; or
 - (b) there has been a rainfall event of more than 25mm over 24 hours at the Quarry Hills recorder site, NIWA agent number 5896, within 6 hours of the application.
11. The discharge area shall not be grazed by stock within 14 days following the discharge of biosolids.
12. The stored or discharged biosolids shall not cause any odour beyond the boundary of the property that is offensive or objectionable in the opinion of the Council's Compliance Officer.
13. The Consent Holder shall add hydrated lime and/or hay (or equivalent material) to minimise odour effects beyond the boundary of the property in accordance with the Biosolids Management Plan.
14. In the event Council's Compliance Officer considers that there is offensive or objectionable odour beyond the boundary of the property, the Consent Holder shall within 24 hours of notification by the Consent Authority, disc the affected land to mechanically incorporate the biosolids into the soil.
15. The Consent Holder shall be responsible for all contracted operations related to the exercise of this consent and must ensure contractors are made aware of the conditions of this consent and ensure compliance with the conditions at all times.

Effluent transport and storage

16. The sludge storage facility referred to in the application as the "Old Anaerobic Lagoon" located at or about map reference (NZTM 2000) 1240941E 4854034N shall not be re-purposed as a treatment or storage facility until the facility has been certified by a Chartered Professional Engineer (CPEng) as having no visible cracks, holes or defects that would allow wastewater, sludge or effluent to leak from the facility. The certification shall be supplied to the Consent Authority upon request.
17. In the event the Old Anaerobic Lagoon is to be decommissioned as a treatment and/or storage facility, within one month of completion of the decommissioning the Consent Holder shall provide to the Consent Authority (EScompliance@es.govt.nz) confirmation in writing from a suitably qualified person that the decommissioning has been undertaken in line with industry best practice.

18. Any biosolids storage facility on the Prime Range Farm shall be a purpose designed bunded slab with an engineered, low permeability base (or concrete slab) and perimeter containment.

Advice Note: *The construction, maintenance and use of the non-agricultural effluent storage facility described in Condition 18 may require resource consent under the proposed Southland Water and Land Plan (Decisions Version) (or any updated version of the plan).*

19. During transport of biosolids from Prime Range Meats to Prime Range Farm, the method of transport shall include appropriate measures to prevent any potential discharge of liquid.

Advice Note: *The consent holder should undertake required works on the accessway at 1637 Wyndham-Mokoreta Road to ensure it meets the standard required by Southland District Council Roading Department.*

Monitoring

20. The Consent Holder shall keep records on a per paddock basis of the following:
- location and size (in hectares) of the discharge area;
 - date of discharge;
 - total volume and/or weight of biosolids discharged;
 - total phosphorus (TP) loadings applied to the discharge area; and
 - total nitrogen (TN) loadings applied to the discharge area.

The Consent Holder shall provide these records to the Consent Authority upon request.

21. Prior to the first exercise of this consent, the Consent Holder shall prepare and submit to the Consent Authority a Biosolid Management Plan for the biosolids. The Biosolid Management plan shall:
- provide clear and concise direction to the Person in Charge and other staff on the operation of the biosolid system;
 - identify environmental risks of biosolid discharges specific to the site including, but not limited to, locations of drains, surface waterways, sub-surface drainage, soil cracks during dry conditions, and critical source areas in the discharge areas; and
 - identify how the above environmental risks are avoided.
22. Unless otherwise agreed to in writing with the Consent Authority, prior to the first discharge of the season (generally September to April), a representative sample of the biosolids shall be taken and analysed for:
- TN, Total Organic Nitrogen (TON), Total Ammoniacal-nitrogen, TP, potassium, sulphur, calcium, magnesium and Total Zinc (Zn);
 - moisture content and dry matter percentage; and
 - E. coli.
23. The results from the sampling required by Condition 22 shall be reported in the Annual Monitoring Report (AMR) referred to in Condition 28.
24. Additional samples shall be collected, analysed and recorded in accordance with Condition 22 for every 200 dry tonnes of biosolids discharged to land, or once a month when the discharge is occurring, whichever occurs first.
25. Unless otherwise agreed to in writing with the Consent Authority, once a year a single representative sample of farm soils which have received biosolids in the prior 12 months shall be analysed for:

- (a) pH
 - (b) Olsen phosphorus
 - (c) Anion storage capacity
 - (d) Potassium
 - (e) Calcium
 - (f) Magnesium
 - (g) Sodium
 - (h) CEC
 - (i) Total base saturation
 - (j) Volume weight
 - (k) Total carbon
 - (l) Total nitrogen
 - (m) C/N ratio
 - (n) Dry matter
 - (o) Moisture content
 - (p) Total zinc
 - (q) Total arsenic
 - (r) Total cadmium
 - (s) Total chromium
 - (t) Total copper
 - (u) Total lead
 - (v) Total nickel
26. The soil sample required by Condition 25 shall be collected from relevant soils, in line with best practice by a suitable qualified person, across a spoil depth of 100mm below ground level.
27. The results of soil sampling required by Condition 25 shall be reported in the Annual Monitoring Report (AMR) referred to in Condition 28.
28. The Consent Holder shall compile an Annual Monitoring Report (AMR) which shall include, but not be limited to:
- (a) a summary of details of the previous 12 months operations detailing nutrient loads applied to land in terms of phosphorus and nitrogen on a per hectare per annum basis which demonstrates compliance with Conditions 5 and 7;
 - (b) a copy of the Nutrient Management plan(s) (NMP) incorporating biosolids discharge to land;
 - (c) a detailed assessment of the PAN loading rates;
 - (d) a detailed assessment of the TP loading rates;
 - (e) a summary of the results required by the conditions of this consent;
 - (f) a report of any complaints received and an evaluation of those complaints regarding the discharge of biosolids;
 - (g) a critical evaluation of the performance of the managerial procedures and physical mechanisms in place to avoid adverse effects on the environment, identify any improvements undertaken and make recommendations on any additional improvements needed;
 - (h) a summary of any difficulties encountered in the previous 12 months and how the problems will be avoided in the future;
 - (i) contingency plans to be followed in the following 12 month period which avoid, remedy or mitigate reasonable worst case scenarios, including adverse weather conditions; and
 - (j) comment regarding any other issue considered important by the Consent Holder.
29. The AMR required by Condition 28 shall be supplied to the Consent Authority (EScompliance@es.govt.nz) by 31 August each year.

Review of consent

30. The Consent Authority may, in accordance with Sections 128 and 129 of the Resource Management Act 1991, serve notice on the Consent Holder of its intention to review the conditions of this consent during the period 1 February to 30 September each year, or within two months of any enforcement action being taken by the Consent Authority in relation to the exercise of this consent, for the purposes of:
- (a) determining whether the conditions of this permit are adequate to deal with any adverse effect on the environment, including cumulative effects, which may arise from the exercise of the permit, and which it is appropriate to deal with at a later stage, or which become evident after the date of commencement of the permit;
 - (b) ensuring the conditions of this consent are consistent with any National Environmental Standards Regulations, relevant plans and/or the Environment Southland Regional Policy Statement;
 - (c) amending the monitoring programme to be undertaken;
 - (d) adding or adjusting compliance limits;
 - (e) ensuring the Mataura Freshwater Management Unit meets the freshwater objectives and freshwater quality limits set in an operative regional plan or National Policy Statement for Freshwater Management; and
 - (f) requiring the Consent Holder to adopt the best practicable option to remove or reduce any adverse effect on the environment arising as a result of the exercise of this permit.

for the **Southland Regional Council**



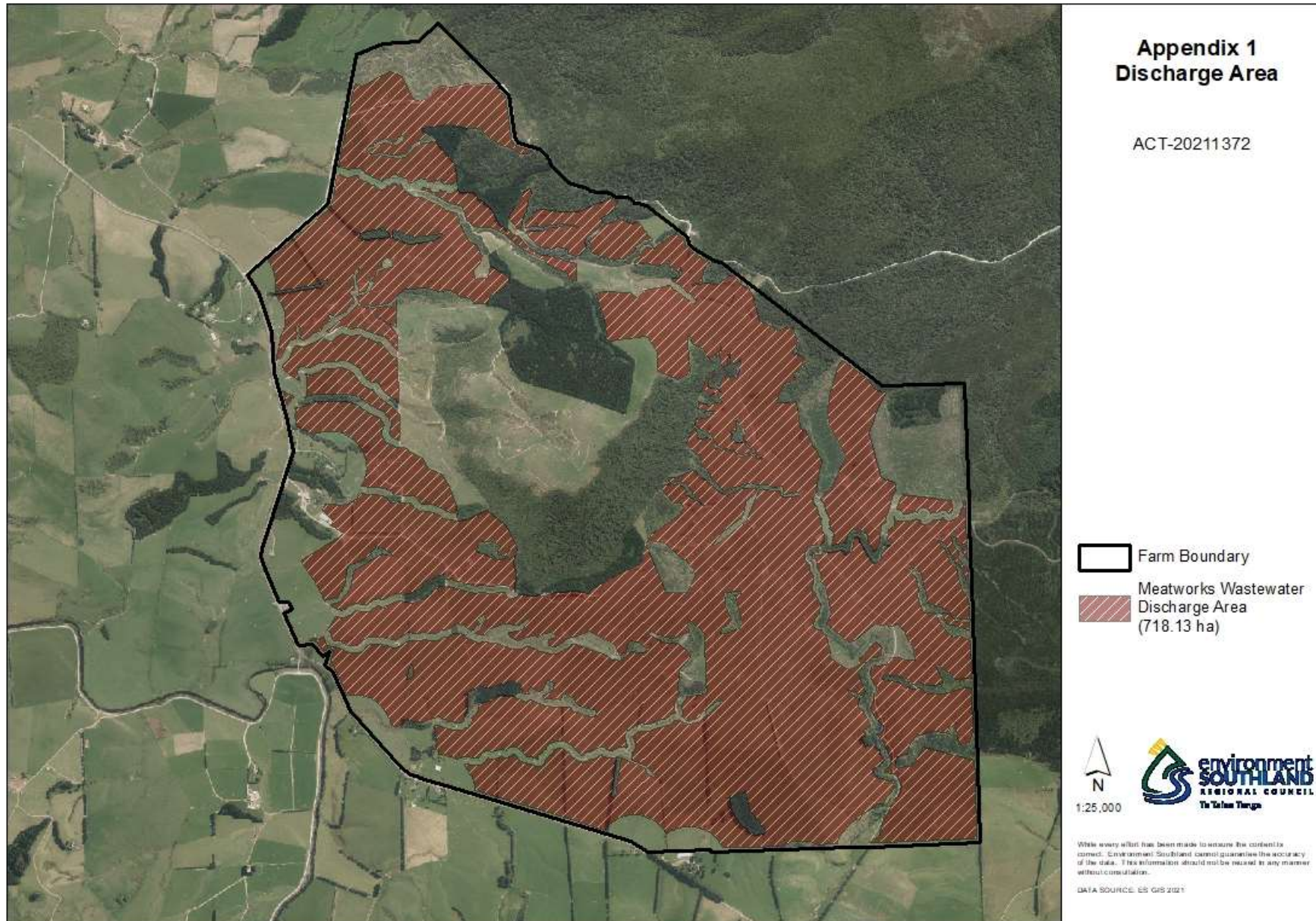
Bruce Halligan

Acting Consents Manager

Notes:

1. *The Consent Holder shall pay an annual administration and monitoring charge to the Consent Authority, collected in accordance with Section 36 of the Resource Management Act, 1991, payable in advance on 1 July each year.*
2. *In accordance with Section 125(1)(a) of the Resource Management Act, this consent will lapse after a period of five years after the date of commencement unless it is given effect to or an application is made to extend the lapse period before the consent lapses.*
3. *In accordance with section 126 of the Resource Management Act, 1991, this consent may be cancelled by the Consent Authority if not exercised for a continuous period of 5 years or more.*
4. *The Consent Holder is reminded that they may apply at any time under Section 127 of the Act to have any condition of this consent changed except that which specifies the expiry date of this consent.*
5. *If you require a replacement permit upon the expiry date of this permit, any new application should be lodged at least 6 months prior to the expiry date of this permit. Applying at least 6 months before the expiry date may enable you to continue to exercise this permit until a decision is made, and any appeals are resolved, on the replacement application.*

AUTH-20211372



Environment Southland is the brand name of the Southland Regional Council



Cnr North Road and Price Street
(Private Bag 90116
DX YX20175)
Invercargill

Telephone (03) 211 5115
Fax No. (03) 211 5252
Southland Freephone No. 0800 76 88 45

Decision of the Southland Regional Council

Non-notified resource consent application

Section 104B and section 113 of the Resource Management Act 1991

Applicant:	Prime Range Meats Limited
RM reference:	AUTH-20211372
Location:	1623 Wyndham-Mokoreta Road
Legal description:	Lot 1 DP 734, Lot 1 DP 7766, Part Section 7 Block I Mokoreta SD, Part Section 8 Block I Mokoreta SD, Part Section 9 Block I Mokoreta SD, Part Section 10 Block I Mokoreta SD, Part Section 11 Block I Mokoreta SD, Part Section 13 Block I Mokoreta SD, Part Section 22 Block I Mokoreta SD, Part Section 29 Block I Mokoreta SD, Part Section 30 Block I Mokoreta SD, Part Section 32 Block I Mokoreta SD, Part Section 33 Block I Mokoreta SD, Part Section 34 Block I Mokoreta SD, Part Section 38 Block I Mokoreta SD, Part Section 39 Block I Mokoreta SD.
Decision date:	10 December 2021
Expiry date:	10 December 2046
Class of activity (ies)	Non-complying
Activities authorised:	To discharge dewatered meatworks wastewater treatment sludge to land by muck spreader
	RELAP rule 5.3.2 pSWLP rule 34

1. Decision

Resource consent is **granted** under delegated authority.

2. Reasons for the decision

The existing environment

Prime Range Meats operates a meat processing facility at 1 Sussex Street, West Plains, Invercargill. The wastewater from meat processing is passed through a screen to remove large solids and grease and is then moved into the new anaerobic lagoon where the sludge settles and liquid wastewater moves to the oxidation ditch where more sludge is removed and the liquid wastewater passes through

a secondary clarifier and is discharged into the ICC wastewater network under an existing trade waste discharge agreement (ICC Trade Waste Conditional Consent Number 49).

The proposed discharge site (Prime Range Farm) is an operational sheep, beef and dairy support farm located 14.5km south east of the Wyndham township in the Mokoreta Valley. It is approximately 1,196ha in size with the discharge area being approximately 690ha due to buffer zones. Prime Range Farm grows 100ha of crop (kale, swedes and fodder beet) a year which will accommodate the biosolids during cultivation. This will generally occur in the spring to coincide with crop rotation and tillage however discharge of biosolids could occur at any time of the year so to coincide with winter cropping or other farm operations.

Effects on the environment

I have had regard to the actual and potential effects on the environment of allowing the activity. These effects are:

- groundwater quality;
- surface water quality;
- soil health;
- odour; and
- cultural/spiritual values.

I agree with and adopt the assessment provided in the AEE and the consent officer's s42A report.

Positive effects

I have had regard to the measures proposed or agreed to by the applicant for the purpose of ensuring positive effects on the environment to offset or compensate for any adverse effects that will or may result from allowing the activity. These are:

- sludge sampling results that indicate the sludge meets the Ministry for the Environment Biosolids Guidelines (MfE, 2003) ceiling concentrations for all parameters, with the exception of zinc;
- 20m discharge buffer to all surface waterways on the property;
- the application area of 690ha is large enough to avoid exceeding 150kgN/ha/yr and 100kgP/ha/yr;
- annual soil sampling and analysis of sodium offered as a condition of consent;
- in the event offensive or objectionable odours do occur the applicant will apply hydrated lime to the discharge area;
- increased buffer distance to residential dwellings on other properties from 100m to 200m;
- reduced their requested term from 35 years to 25 years which is consistent with policy 3.5.4.13 of Te Tangi a Tauri.

Assessment under relevant plans

I have had regard to the relevant provisions of the National Policy Statement for Freshwater Management 2020, the proposed Southland Water and Land Plan 2018 and the operative Regional Effluent Land Application Plan 1998. The principal provisions are:

- National Policy Statement for Freshwater Management 2020
 - Policy 1 seeks to manage freshwater in a way that gives effect to Te Mana o te Wai.

- Policy 2 seeks to actively involve Tangata Whenua in freshwater management and Māori freshwater values are identified and provided for.
 - Policy 3 seeks to manage freshwater in an integrated way that considers the effects of the use and development of land on a whole-of-catchment basis, including the effects on receiving environments.
 - Policy 15 seeks to enable communities to provide for their social, economic, and cultural well-being in a way that is consistent with the NPS.
- Proposed Water and Land Plan 2018
- Policy 6 seeks to avoid, remedy, or mitigate adverse effects on water quality in the Bedrock/Hill Country Physiographic zone by requiring implementation of GMP's to manage contaminants transported via artificial drainage, and overland flow where relevant and having particular regard to those contaminant pathways when assessing resource consents applications.
 - Policy 13 seeks to manage land use activities and discharges to enable the achievement of Policies 15A, 15B and 15C.
 - Policy 16A seeks to minimise adverse environmental effects by requiring the adoption of the best practicable option to manage the treatment and discharge of contaminants derived from industrial and trade processes.
- Regional Effluent Land Application Plan 1998
- Policy 4.2.3 seeks to avoid where practicable, remedy or mitigate adverse effects on water from sludge discharges to land.
 - Policy 4.2.6 seeks to avoid where practicable, remedy or mitigate adverse effects to human and animal health arising from sludge discharges to land.
 - Policy 4.2.7 seeks to promote good practice and regular maintenance off sludge systems.
 - Policy 4.3.8 seeks to recognise and provide for tangata whenua concerns related to the discharge of sludge to land.

I consider that granting consent will assist and not detract from achieving the objectives of those plans.

The activities described in the application do not trigger any further considerations under the Regional Policy Statement, or any other National Policy Statements or National Environmental Standards.

Granting this resource consent is not contrary to section 107 or section 217 of the Resource Management Act 1991.

Granting this resource consent achieves the purpose of the Resource Management Act 1991 as set out in section 5.

3. Conditions

The consent is granted subject to conditions. These conditions are consistent with section 108 of the Resource Management Act 1991.

Please read and ensure you understand and implement these conditions. By law you are required to comply with them for the duration of the consent. Failure to show compliance with conditions of a consent on inspection may result in enforcement action.

For the **Southland Regional Council**



Bruce Halligan
Acting Consents Manager

Notes

1. Right to object: Applicants and consent holders have the right to object to any part of this decision to Environment Southland. Objections must be in writing and received by Environment Southland within 15 working days of the decision being notified. Objectors can request the objection be heard by an independent commissioner. The procedure for making and hearing objections is set out in sections 357A to 357D of the Resource Management Act 1991.
2. Right to appeal: The applicant, the consent holder (if different), and any person who made a submission on the application may appeal against any part of this decision (including the consent conditions conditions) to the Environment Court. A submitter's appeal is limited in scope by the matters raised in their submission. Appellants have 15 working days to lodge an appeal, from the date they received notice of this decision. The right to appeal and procedure for lodging appeals is outlined in sections 120 and 121 of the Resource Management Act 1991.
3. Our costs: An invoice for our costs of working on your application will be forwarded to you shortly.
4. Expiry of consent: Please note the expiry date of your resource consent(s). The expiry date will be printed in on the first page of the consent. You can only undertake the activity legally between now and the expiry date. If you wish to continue with the activity after the consent expires, you will need to apply for and obtain a new resource consent in advance. We recommend you re-apply at least six months before any current consent will expire.
5. Lapse of consent: Please note that the resource consent(s) will lapse if you do not 'given effect' to it within five years of it being granted (or otherwise within a different period specified on the particular consent). Lapse of a consent has the same effect as an expiry. The consent will not lapse if you commence the activity within five years. A longer lapse period can be applied for. Please contact us in advance if you think you are not likely to give effect to the consent before it lapses.
6. Cancellation of consent: Resource consents can be cancelled if they are unexercised for a period of five years. Cancellation of a consent has the same effect as an expiry.