WYNNWILLIAMS

MEMORANDUM

Date: 8 April 2022

To: Hilary Lennox and Joanna Gilroy

From: Michelle Mehlhopt

RM20.280 SMOOTH HILL LANDFILL – ALTERNATIVES ASSESSEMENT

1. Dunedin City Council (**DCC**) have applied for various resource consents, RM20.280, from the Otago Regional Council (**ORC** or **Council**) in relation to Smooth Hill Landfill (**Proposal**). DCC's application was publicly notified and has been scheduled for a hearing.

2. In preparation of the section 42A report for the hearing, you have asked us whether there is any other policy or case law that assists in determining whether the assessment of alternatives undertaken by DCC is adequate.

Executive summary

3. Ultimately, whether the level of detail provided in a description of alternatives is adequate, and the consent authority's corresponding duty to consider those alternatives, is case specific and will depend on the nature and scale of the activity and its potential impact on the environment.

4. However, the case law suggests that there are limits on the extent an applicant, and a consent authority, is required to described and consider alternatives. Such limits include whether alternatives are reasonably necessary to determine the application, that a *description* does not extend to a full assessment of the costs and benefits nor a demonstration that the proposed activity is the best proposal, that alternatives are restricted to the relevant district or region, and the level to which adverse effects of an activity are mitigated. It is important to note that the consideration of alternatives is only part of the assessment of the merits of an activity.

5. Our detailed analysis follows.

Statutory requirements for consideration of alternatives

6. The Resource Management Act 1991 (**RMA**) requires applications to include a description of alternatives in certain circumstances, and also places an obligation on consent authorities in some circumstances to consider alternatives when considering an application.

Schedule 4 of the RMA – application requirements

7. Schedule 4 of the RMA requires an assessment of environmental effects (**AEE**) to include a description of alternatives and states:

> (1) An assessment of the activity's effects on the environment must include the following information:
>
> …
>
> (d) if the activity includes the discharge of any contaminant, a description of—
>
> …
>
> (ii) any possible alternative methods of discharge, including discharge into any other receiving environment:

8. Given DCC has applied for a discharge consent as part of the Proposal, clause 6(1)(d)(ii) applies to DCC's application. Therefore, DCC's AEE, to the extent it relates to the aspects of the Proposal that requires a discharge consent, must include a description of alternative methods of discharge, including discharge into any other receiving environment.

9. A description of alternatives by DCC may also be required under clause 6(1)(a) of Schedule 4. Clause 6(1)(a) requires an AEE to include a description of any possible alternative location or methods for undertaking the activity if it is likely that the activity will result in any significant adverse effect on the environment. Therefore, if there is likely to be a significant adverse effect as a result of the Proposal, DCC's application for the Proposal must also include an description of alternative locations or methods for the Proposal.

Council's obligation to consider alternatives

10. For completeness, section 105(1)(c) of the RMA reflects the wording of clause 6(1)(d)(ii) of Schedule 4. Under section 105(1)(c), the Council, in addition to matters in section 104(1), must have regard to any possible alternative methods of discharge, including discharge into any other receiving environment.

11. Additionally, the consideration of alternatives where there is likely to be a significant adverse effect may be a relevant matter under section 104(1)(c) of the RMA.[1]

12. The RMA does not provide any further detail on what is an adequate description or consideration of alternatives.

National Environmental Standards for Freshwater 2020

13. We understand that part of the Proposal, being vegetation clearance within, or within a 10 m setback from, a natural wetland, is a restricted discretionary activity under the National Environmental Standards for Freshwater 2020 (**NES-F**). Regulation 56 of the NES-F sets out the matters to which discretion is restricted and includes "whether there are practicable alternatives to undertaking the activity that would avoid those adverse effects". However, we note that the application has an overall status as a discretionary activity therefore the Council's discretion is not limited in this manner.

Case law regarding consideration of alternatives

Significant adverse effect requiring consideration of alternatives

14. The Courts have found that if a consent authority concludes that a proposal is likely to have or has significant adverse effects on the environment then the availability of alternatives may be a relevant matter for consideration under section 104(1)(c).[2]

15. When deciding whether to consider alternatives under section 104(1)(c), the Court in *Meridian Energy Ltd v Central Otago District Council* asked whether alternative locations were relevant and reasonably necessary to determine the application.[3] It is a fact specific question whether or not an applicant should be required to look at alternatives, and the extent to which that alternatives analysis is carried out.[4]

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1 *Meridian Energy Ltd v Central Otago DC* [2010] NZRMA 477 (HC); *Queenstown Lakes District Council v Lakes District Rural Land Owners Soc Inc* [2002] NZRMA 81 (HC).

2 *Meridian Energy Ltd v Central Otago DC* [2010] NZRMA 477 (HC); *Queenstown Lakes District Council v Lakes District Rural Land Owners Soc Inc* [2002] NZRMA 81 (HC).

3 *Meridian Energy Ltd v Central Otago DC* [2010] NZRMA 477 (HC) at [65].

4 *Director-General of Conservation (Nelson-Marlborough Conservancy) v Marlborough District Council* [2010] NZEnvC 403 at [690].

16. Although the Courts have recognised there ought to be some limit to what is raised in terms of alternative locations and methods, those limits are difficult to prescribe in advance.[5] This suggests that by in large, the level of detail or what is required when describing and considering alternatives is to be determined case by case.

17. However, the High Court in *Meridian Energy Ltd v Central Otago District Council* found there were limits to what could be required in terms of the consideration of alternatives, including:

    a. The applicant is only required to provide *a description* of alternative locations.[6]

    b. A "description" does not extend to a full cost-benefit analysis of alternative locations or methods.[7] Nor is an applicant required to demonstrate that its proposal represents the best use of the subject resources or is best in net benefit terms.[8]

    c. That alternatives provided by the Applicant only need to be in relation to the area within the district or region of the consent authority.[9]

    d. The consideration of alternatives is only part of the evaluation of the merits of an application in the context of section 104 and the focus needs to be on the merits of a proposal.[10]

    e. The level of detail required for a description of alternative sites is proportional to the size of the proposal and its potential impact on the environment.[11]

18. Additionally, any alternatives need to be within the applicant's capacity to arrange.[12]

19. The High Court's decision in *Meridian Energy Ltd v Central Otago District Council,* suggests that if a consideration of alternative methods or an alternative site is required, it is only a description of the alternatives, not a full assessment of them.

20. However, the detail of the description will need to be proportional to the scale Proposal and its potential effects on the environment. This is reinforced by clause 2(3)(c), Schedule 4, of the RMA which requires an application to include an assessment of the activity's effects on the environment that includes such detail as corresponds with the scale and significance of the effects that the activity may have on the environment

Discharge consent requiring consideration of alternatives

21. Given the similarities in the wording between clauses 6(1)(d)(ii) and 6(1)(a) of Schedule 4, in that both require a "description" of any possible alternatives methods or location/receiving environment, we consider the case law in relation to the description and consideration of alternative locations and/or methods when there is a significant adverse effect provides some guidance for the description and consideration of alternative methods or receiving environments for a discharge.

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5 *Transpower New Zealand Limited v Rodney District Council* A56/1994 (PT) at [316].

6 *Meridian Energy Ltd v Central Otago DC* [2010] NZRMA 477 (HC) at [68].

7 *Meridian Energy Ltd v Central Otago DC* [2010] NZRMA 477 (HC) at [148].

8 *Meridian Energy Ltd v Central Otago DC* [2010] NZRMA 477 (HC) at [121] and [148].

9 *Meridian Energy Ltd v Central Otago DC* [2010] NZRMA 477 (HC) at [93] and [148].

10 *Meridian Energy Ltd v Central Otago DC* [2010] NZRMA 477 (HC) at [148].

11 *Meridian Energy Ltd v Central Otago DC* [2010] NZRMA 477 (HC) at [148].

12 *Director-General of Conservation (Nelson-Marlborough Conservancy) v Marlborough District Council* [2010] NZEnvC 403 at [696].

22. However, the focus of the alternatives considered under each clause are different, clause (1)(d)(ii) requires a description of alternatives relating to a discharge, rather than a description of alternatives due to a significant adverse effect. For example, the Environment Court in *Walker v Hawke's Bay Regional Council*, when considering a proposal for removing willows by spraying via helicopter, noted it is the alternative methods of discharge that have to be examined, not alternative methods of removing the willows.[13]

23. The Environment Court when considering alternatives under section 105 in *Maungaharuru-Tangitu Trust v Hawke's Bay Regional Council*, considered alternatives to the extent it could identify where there were any practical or realistic alternatives.[14]

24. By way of example, when undertaking a section 105 assessment the Court has considered the following as appropriate alternatives (noting the level of detail required for each activity will be case specific):

    a. discharging to land instead of to water;[15] and

    b. additional treatment or dilution prior to the discharge.[16]

25. When undertaking the 105 assessment, the Court has found that a desk top consideration of an alternative was appropriate for the purpose of considering alternatives.[17] Again, the appropriateness of this will depend on the nature of the proposal.

26. In some circumstances if the effects of the discharge are sufficiently mitigated by conditions of consent, a less detailed description and consideration of alternative methods or receiving environment for a discharge may be appropriate. The Environment Court in *Mahuta v Waikato Regional Council* found that because appropriate conditions were proposed any adverse effects of the discharge on the river environment would be prevented, so it was not necessary to consider the alternative method of discharge any further.[18]

Policy guidance regarding consideration of alternatives

27. We have not identified any further policy guidance, other than Policy 7.4.8 of the Regional Plan: Waste for Otago (**RP Waste**), that assists in determining whether the assessment of alternatives undertaken is adequate for DCC's Proposal.

28. Policy 7.4.8 of the RP Waste states "*To promote alternatives to landfills as a means of waste disposal*". This policy only requires the Council to "promote" alternatives, and does not require a resource consent to be declined if there are feasible alternatives.

29. The explanation behind the policy states "Landfills should be considered only where other alternatives such as waste minimisation, cleaner production, recycling, or other methods of waste disposal have failed or are impracticable to implement". Although this policy does not require consent to be declined, given specific examples of

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13 *Walker v Hawke's Bay Regional Council* [2003] NZRMA 97 at [58].

14 *Maungaharuru-Tangitu Trust v Hawke's Bay Regional Council* [2016] NZEnvC 232, [2017] NZRMA 147 at [152]-[170].

15 *Mahuta v Waikato Regional Council*, EnvC, Auckland, A91/1998, 29 July 1998, at [189].

16 *Maungaharuru-Tangitu Trust v Hawke's Bay Regional Council* [2016] NZEnvC 232, [2017] NZRMA 147 at [161] and [165].

17 *Maungaharuru-Tangitu Trust v Hawke's Bay Regional Council* [2016] NZEnvC 232, [2017] NZRMA 147 at [155].

18 *Mahuta v Waikato Regional Council*, EnvC, Auckland, A91/1998, 29 July 1998, at [189].

alternatives are identified, those alternatives where relevant may need to be considered for a landfill activity in order to be consistent with Policy 7.4.8.

Conclusion

30. We trust the above advice assists. If you have any further questions or wish to discuss, do let us know.

Wynn Williams