

**BEFORE THE INDEPENDENT COMMISSIONER
HEARING PANEL**

UNDER the Resource Management Act 1991 (RMA)
IN THE MATTER an application by Dunedin City Council for various permits
for the purpose of the construction and operation of a
landfill at Smooth Hill, Dunedin (RM20.280).

**LEGAL SUBMISSIONS ON BEHALF OF OTAGO REGIONAL COUNCIL
24 May 2022**

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MAY IT PLEASE THE PANEL:

Introduction

- 1 These legal submissions are provided in response to issues raised during the course of the hearing, including:
 - (a) What is the scope of conditions that can be imposed on an *Augier* basis?
 - (b) Does the application give rise to reverse sensitivity effects?
 - (c) Should consent conditions be taken into account when considering whether an activity will result in any significant adverse effect on the environment under Schedule 4, Clause 6(1)(a) of the RMA?
 - (d) What weight should be given to the Partially Operative and Proposed Otago Regional Policy Statements?
 - (e) Is Policy 3 of the New Zealand Coastal Policy Statement a relevant consideration under section 104(1)(b) of the RMA?
 - (f) Does the Hearing Panel have jurisdiction to grant resource consents under the Resource Management (National Environmental Standards for Freshwater) Regulations 2020 (**NES-F**)?
 - (g) If resource consents are not being sought under the NES-F, should the Application be deferred under section 91 of the RMA?
 - (h) What is the activity status of the application?

What is the scope of conditions that can be imposed on an *Augier* basis?

- 2 In the Chair's comments on proposed consent conditions, it is noted that "any conditions must derive from (and refer) to actual consented activities. Even 'Augier' conditions should relate to a consent activity."
- 3 Section 108AA provides:
 - (1) A consent authority must not include a condition in a resource consent for an activity unless –
 - (a) The applicant for the resource consent agrees to the condition; or
 - (b) The condition is directly connected to 1 or more of the following:
 - (i) an adverse effect of the activity on the environment:

- (ii) an applicable district or regional rule, or a national environmental standard:
- (iii) a wastewater environmental performance standard made under section 138 of the Water Services Act 2021; or
- (c) the condition relates to administrative matters that are essential for the efficient implementation of the relevant resource consent.

[my emphasis]

- 4 If a condition is agreed to by an applicant, it does not need to be directly connected to the matters in sub-clause (b).
- 5 Case law has established principles regarding these types of conditions known as *Augier* conditions, including whether *Augier* conditions need to also meet the requirements of conditions imposed by a consent authority. Such requirements, known as the *Newbury* tests, include that the condition is for a resource management purpose, fairly and reasonably relates to the activity for which consent is sought and not be so unreasonable that no reasonable consenting authority could have imposed it.¹
- 6 The Environment Court in *Kirton v Napier City Council* specifically considered whether an *Augier* condition volunteered by the applicant for a resource consent would be invalid if it did not meet the *Newbury* tests.² The Court considered *Augier* conditions did not need to meet the *Newbury* tests stating:³
- ...there would be no point in any applicant offering (or any consent authority imposing at the request of an applicant) a condition which could not otherwise be imposed by a consent authority. We do not think that is a desirable outcome. By way of example, it is not uncommon for applicants to volunteer conditions which offer environmental compensation or betterment sometimes not directly related to the consent being sought. Such proposals would be meaningless if they could be challenged by a subsequent owner.
- 7 In addition, the Environment Court in *Kirton v Napier City Council*, considered the proposition that an *Augier* condition needs to meet the

¹ *Newbury DC v Secretary of State for the Environment* [1981] AC 578. In New Zealand, the Court of Appeal held *that* this test remains of general application and should be applied in relation to the RMA: *Housing NZ Ltd v Waitakere City Council* [2001] NZRMA 202 at [18] (CA).

² *Kirton v Napier City Council* [2013] NZEnvC 66 at [56].

³ *Kirton v Napier City Council* [2013] NZEnvC 66 at [57].

Newbury tests was contrary to previous case law⁴ and referred to the following excerpt of the High Court's decision in *Springs Promotions Ltd v Springs Stadium Residents Association*:⁵

That case (*Augier*) is authority for the proposition that an applicant for planning permission who gives an undertaking to a planning authority which is relied upon in granting the permission, is estopped from later asserting that there was no power to grant the permission subject to a condition based on the undertaking.

- 8 Therefore, provided a condition is an *Augier* condition, by meeting the factors of an *Augier* condition set out below, a condition agreed to by an applicant under section 108AA(1)(a) does not necessarily need to relate to the activity for which consent is sought.
- 9 The factors required to be present to establish an *Augier* condition include:⁶
- a. A clear and unequivocal undertaking to the Court and/or the other parties;
 - b. Receipt of the grant of resource consents in reliance on that undertaking;
 - c. The imposition of a condition on those resource consents which broadly encompassed the undertaking; and
 - d. Detriment to the Court or other parties if the undertaking is not complied with.
- 10 If a condition is not agreed to by an applicant, it must meet either clauses (1)(b) or (c) of section 108AA.

Reverse sensitivity

- 11 There has been discussion throughout the hearing about whether the establishment of the Smooth Hill landfill may result in reverse sensitivity effects on Dunedin International Airport. This has been in the context of Policy 4.3.5 of the Partially Operative Otago Regional Policy Statement (**Partially Operative RPS**) which seeks to restrict the establishment of activities that may result in reverse sensitivity effects on infrastructure with national or regional significance (i.e. Dunedin International Airport) and EIT-INF-P15 of the Proposed Otago Regional Policy Statement

⁴ *Kirton v Napier City Council* [2013] NZEnvC 66 at [58].

⁵ *Springs Promotions Ltd v Springs Stadium Residents Association* [2006] NZRMA 101 at [76].

⁶ *Frasers Papamoa Ltd v Tauranga City Council* [2010] NZRMA 29 at [34].

(Proposed RPS) which seeks to avoid the establishment of these activities.

- 12 Mr Page for Dunedin International Airport Limited (**DIAL**) submitted that there are both direct and reverse sensitivity effects on the airport. There is the direct effect of an aviation incident on those in the aircraft or the owner of the aircraft. The effect on DIAL is a constraint on operations by the Civil Aviation Authority (**CAA**). Even though the landfill operation is not a sensitive activity, the CAA as regulator creates a reverse sensitivity effect as the regulator can constrain the activities of DIAL as a result of the bird presence.
- 13 As Mr Bonis acknowledged, this is not an orthodox approach to reverse sensitivity. The concept of reverse sensitivity is used to refer to the effects of sensitive activities on other legitimate activities in their vicinity, particularly if it becomes necessary to restrain those other activities in order to accommodate the sensitive activity.⁷ It has been described as:⁸
- Reverse sensitivity is the legal vulnerability of an established activity to complaint from a new land use. It arises when an established use is causing environmental impact to nearby land, and a new, benign activity is proposed for the land. The 'sensitivity' is this: if the new use is permitted, the established use may be required to restrict its operations or mitigate its effects so as not to adversely affect the new activity.
- 14 Although this Application involves a situation where the presence of birds from the landfill may result in the CAA imposing constraints on the operation of the airport, the airport is not having an impact on the landfill (i.e. the landfill is not a 'sensitive activity').
- 15 In any event, in my submission the question of whether there are reverse sensitivity effects is a relatively moot point. Any potential constraint on the airport's operation as a result of bird presence is, in my submission, a potential effect on the environment which should be considered in the context of the underlined parts of EIT-INF-P15 and Policy 4.3.5 below.

⁷ *Winstone Aggregates Ltd v Papakura DC EnvC A049/02.*

⁸ The Court in *Gateway Funeral Services v Whakatane DC EnvC W005/08* adopted the definition discussed by Bruce Pardy and Janine Kerr in *Reverse Sensitivity – the Common Law Giveth and the RMA Taketh Away*, 1999 3 NZJEL 93.

EIT-INF-P15

Seek to avoid the establishment of activities that may result in reverse sensitivity effects on nationally or regionally significant infrastructure, and/or where they may compromise the functional or operational needs of nationally or regionally significant infrastructure.

Policy 4.3.5

Protect infrastructure with national or regional significance, by all of the following:

- a) Restricting the establishment of activities that may result in reverse sensitivity effects;
- b) Avoiding significant adverse effects on the functional needs of such infrastructure;
- c) Avoiding, remedying or mitigating other adverse effects on the functional needs of such infrastructure;
- d) Protecting infrastructure corridors from activities that are incompatible with the anticipated effects of that infrastructure, now and for the future.

Should consent conditions be taken into account when considering whether an activity will result in any significant adverse effect on the environment under Schedule 4, clause 6(1)(a) of the RMA?

- 16 The Panel has asked legal counsel to address whether the Panel is to take into account consent conditions when considering whether the activity will result in any significant adverse effect on the environment under Schedule 4, Clause 6(1)(a).
- 17 Clause 6(1)(a) provides that if it is likely that the activity will result in any significant adverse effect on the environment, the assessment of the activity's effects on the environment must include a description of any possible alternative locations or methods for undertaking the activity.
- 18 Clause 6(1)(a) only requires an applicant to provide a description of alternatives. It does not require the Applicant to propose conditions relating to alternatives, although it does not restrict the Applicant from doing so.

- 19 The Courts have held that proposed conditions of consent are able to be taken into account as mitigating the effects of an activity if the conditions are inherent in the application.⁹ In order to determine what the adverse effects on the environment are as a result of a proposed activity requires a consideration of the conditions which affect the reality of what those effects would be.¹⁰ However, conditions that are not inherent in the application cannot.¹¹
- 20 Therefore, it would be appropriate for the Hearing Panel to consider the conditions proposed by the Applicant (or that are inherent in the application) when considering the significance of effects under Clause 6(1)(a), but not conditions that could be imposed by the Hearing Panel, but are not proposed by the Applicant or inherent in the Application.

What weight should be given to the Partially Operative and Proposed Otago Regional Policy Statements

- 21 The weight to be given to a proposed plan or policy statement is a matter for the decision-maker. Accordingly, it is for the Hearing Panel to determine what weight to give to the Partially Operative and Proposed RPSs.
- 22 There are two aspects to weight. First, the weight to be given to the provisions of the policy statement and second, the weight (or strength of direction) of its individual provisions.¹²
- 23 Relevant principles that apply to the weight to be given to proposed objectives and policies include:¹³
- (a) The Act does not accord proposed plans equal importance with operative plans, rather the importance of the proposed plan will

⁹ *Guardians of Paku Bay Association Inc v Waikato Regional Council* [2012] 1 NZLR 271 (HC) at [129] citing *Auckland Regional Council v Rodney District Council* [2009] NZCA 99 at [53] to [60]; and *Montessori Preschool Charitable Trust v Waikato District Council* [2007] NZRMA 55 (HC) at [12].

¹⁰ *Montessori Preschool Charitable Trust v Waikato District Council* [2007] NZRMA 55 (HC) at [12]. This decision was in the context of a decision on notification, however it is considered the same principle applies to the decision of whether to grant or decline an application, and was cited by the High Court as relevant authority when considering and application under section 104 of the RMA.

¹¹ *Auckland Regional Council v Rodney District Council* [2009] NZCA 99 at [53]. As above, this decision was in the context of a decision on notification, however it is considered the same principle applies to the decision of whether to grant or decline an application, and was cited by the High Court as relevant authority.

¹² *Granger v Dunedin City Council* [2018] NZEnvC 250 at [42]

¹³ *Keystone Watch Group v Auckland City Council EnvC Auckland A007/01*, 11 January 2001, as affirmed by the High Court in *Keystone Ridge Ltd v Auckland City Council* HC Auckland AP24/01, 3 April 2001 at [16], [36] and [37].

depend on the extent to which it has proceeded through the objection and appeal process.

- (b) The extent to which the provisions of a proposed plan are relevant should be considered on a case by case basis and might include:
 - (a) the extent (if any) to which the proposed measure might have been exposed to testing and independent decision-making (and the level of objection/challenge to the proposed provisions);
 - (b) circumstances of injustice;
 - (c) the extent to which a new measure, or the absence of one, might implement a coherent pattern of objectives and policies in a plan.
- (c) In assessing the weight to be accorded to the provisions of a proposed plan each case should be considered on its merits. Where there has been a significant shift in Council policy and the new provisions accord with Part 2, the Hearing Panel may give more weight to the proposed plan.

- 24 The provisions of the Partially Operative RPS that are relevant to this application are all beyond challenge. Therefore, full weight may be given to the relevant provisions of the Partially Operative RPS.
- 25 The Proposed RPS is at a relatively early stage of the process and has not yet been subject to independent testing or decision-making. The closer a proposed plan comes to its final content, generally speaking, the more regard is had to it. However, each case depends on the particular circumstances. In this case, there are several factors which justify giving some weight to the Proposed RPS.
- 26 It is common ground that the Partially Operative RPS does not accord with Part 2, nor give effect to the National Policy Statement for Freshwater Management 2020 (**NPSFM 2020**) (or its predecessor, the NPSFM 2014 (amended 2017)). This was a key factor behind the Minister for the Environment's recommendation to the Otago Regional Council under section 24A of the Act to prepare a regional policy statement for notification in November 2020 (later amended to June 2021 with the Minister's approval).

- 27 A review of the Partially Operative RPS has found that issues with drafting of the document has impacted the effectiveness of its provisions, and hence its ability to effectively guide effective decision-making in the Otago region. These drafting issues include:¹⁴
- (a) The overly broad nature of the objectives. Little direction is provided to the policies about the actions required to achieve the objectives.
 - (b) As a result of the broad objectives, policies are specifying both the outcomes sought and the courses of action to achieve them, when they should be drafted to achieve just the latter.
 - (c) A lack of integration between many of the chapters. This has resulted in an unclear relationship between the provisions of separate chapters, with a reduced ability to effectively reconcile conflicts between them.
- 28 The Proposed RPS seeks to implement a coherent pattern of objectives and policies. The relevant objectives and policies of the Proposed RPS have been drafted to provide clear outcomes and the course of action through which those outcomes are to be achieved.
- 29 The Proposed RPS has been drafted to give effect to the NPSFM 2020 and includes clear direction in the *IM – Integrated Management*, *LF – Land and Freshwater* and *EIT – Energy, Infrastructure and Transport* chapters.
- 30 For these reasons, it is submitted that it is appropriate for the Hearing Panel to place some weight on the provisions of the Proposed RPS when making its decision.

Is section 3 of the New Zealand Coastal Policy Statement a relevant consideration under section 104(1)(b)?

- 31 Ms Irving has submitted that the application engages the New Zealand Coastal Policy Statement (**NZCPS**), in particular Policy 3 which requires that a precautionary approach is adopted toward proposed activities whose effects on the coastal environment are uncertain, unknown, or little understood, but potentially significantly adverse.¹⁵

¹⁴ See *Alliance Group Limited v Otago Regional Council* [2019] NZEnvC 42 at [8].

¹⁵ Opening Submissions of Counsel for the Submitter Group dated 17 May 2022 at [14].

- 32 In answers to a question from the Hearing Panel, Ms Irving submitted that if the Panel agrees with Mr Rumsby that there are bioaccumulation effects on aquatic life in the coastal environment, then the NZCPS is engaged. Ms Irving referred to an Environment Court decision in *Clutha* as precedent regarding consequential effects.
- 33 The ability to consider the consequential effects of an activity on a resource consent application has recently been clarified by the High Court in *Clutha District Council v Otago Regional Council*.¹⁶ In considering an appeal relating to the duration of a water permit, the High Court noted that the Environment Court was required to consider the matters contained in section 104 to the extent relevant to the duration, including any actual or potential effect on the environment. The Environment Court was able to have regard to the consequential effects of the end use of the resource that was the subject of the resource consent application, but within limits of nexus and remoteness.
- 34 The Court reviewed the relevant case law on the matter, before determining that provided there was a sufficient nexus between consequential effects and they were not too remote, they were required to be considered in the assessment of the effects of the resource consent application for the purpose of promoting the sustainable management of natural and physical resources.¹⁷
- 35 The Court in that case concluded that the use of the water for dairy shed washdown and its subsequent discharge to the environment had a sufficient nexus to the take of water, and were not so remote so as to be matters the Environment Court could not consider. The High Court determined that the use of the water for that purpose was more than inevitable or foreseeable (as it was already happening). The Court also referred to the physical connection of the effect, in that the water was piped directly to the properties for which it was used for dairy shed washdown. The District Council was also able to control to a significant extent how water from the scheme was to be used (as it determined to whom water would be allocated). The Environment Court's holistic approach to the assessment of the activity in considering integrated

¹⁶ *Clutha District Council v Otago Regional Council* [2022] NZHC 510.

¹⁷ *Clutha District Council v Otago Regional Council* [2022] NZHC 510 at [51].

management and ki uta ki tai was consistent with the National Policy Statement for Freshwater Management 2020.¹⁸

- 36 In this case, the question is whether the NZCPS is a relevant consideration, given potential consequential effects of the proposed activity on the coastal environment.
- 37 The position in *Clutha* could, in my submission, extend to the consideration of adverse effects on the coastal environment, provided that the Panel is satisfied on the evidence that:
- (a) The alleged effects are not too uncertain or remote (a matter of fact and degree to be considered in each factual scenario);
 - (b) The potential effects are inevitable (or at the very least foreseeable) from the proposed activity;
 - (c) There is some level of physical connection between the adverse effect of concern and the proposed activity;
 - (d) The applicant has some level of control over the alleged adverse effect (i.e. that it could be affected by consent conditions or amendments to the application).

National Environmental Standards for Freshwater (NES-F)

- 38 As set out in section 5 of Ms Lennox's section 42A Report, the Proposal requires consent under Regulations 52 and 54 of the NES-F.
- 39 Counsel for the Submitter Group has submitted that resource consents have not been applied for under the NES-F and that the hearing of the Application should be deferred under section 91 to enable the applications to be made and heard together.
- 40 Counsel for Forest & Bird has submitted that under section 43B(7) of the RMA, regulations 52 and 54 of the NES-F prevail and therefore the Application's activity status is non-complying.
- 41 Ms Lennox has prepared her recommending report for notification, section 42A report and section 42A reply report on the basis that the Applicant has applied for resource consents under the NES-F. It will be

¹⁸ *Clutha District Council v Otago Regional Council* [2022] NZHC 510 at [51]-[63].

for the Applicant to confirm whether it is seeking resource consent under the NES-F regulations. These submissions address:

- (a) If the Applicant is seeking resource consent under the NES-F regulations, whether these consents can be granted by the Hearing Panel;
- (b) If resource consents are not being sought under the NES-F, whether the Application should be deferred under section 91 of the RMA; and
- (c) The activity status of the application.

Relevant timeline

- 42 The timeline for lodgement, notification and subsequent amendment of the Application and the Gazettal and commencement of the NES-F is relevant to the consideration of these issues.
- 43 The relevant dates for the NES-F and the Application are as follows:
 - (a) The NES-F was published in the Gazette under the Legislation Act 2019 on 3 August 2020.
 - (b) The Application was lodged on 27 August 2020.
 - (c) The NES-F commenced on 3 September 2020.
 - (d) The Application was amended in May 2021.
 - (e) A decision was made to notify the Application on 13 September 2021.¹⁹
 - (f) The Application was publicly notified on 18 September 2021.
 - (g) The Application was further amended on 7 April 2022 to realign the proposed road carriageway to avoid any direct impact on wetlands located alongside McLaren Gully Road.

Reference to the NES-F in the relevant application documents

- 44 The original application was lodged in the period between the NES-F being gazetted on 3 August 2020 and commencing on 3 September 2020. The application noted that the ORC administers the NES-F and

¹⁹ The legal submissions on behalf of Forest & Bird incorrectly state that the decision to notify the application was made on 13 September 2020 and that the Application was publicly notified on 18 September 2020.

identified that the NES-F relevantly controls activities affecting natural wetlands, and the reclamation of rivers.²⁰ It noted that the NES-F was coming into force on 3 September 2020 and that the relevant rules were considered in the assessment that followed. It identified that:²¹

Where the rules of the NES results in a more stringent activity status for some activities than under the Regional Plan: Water, section 88A of the RMA provides that status of the activities at the time the applications were made (controlled, restricted discretionary, or non-complying) remains unchanged.

45 Section 7.2.1 of the application then addressed the application of rules relating to wetlands and rivers. The application:²²

Assumed out of caution that the swamp wetland is a “river”, and therefore the relevant NESFW regulation 57, and Chapter 13 rules have been considered in the assessment that follows.

46 Section 7.2.2 of the Original Application described the resource consents being applied for:

The resource consents that are being applied for each of the proposed project activities, and their activity status, under the relevant rules of the Regional Plans are outlined in Table 8 below. Components of the project that are a permitted activity, and do not require resource consent are also identified.

47 Table 8 set out the relevant plan rules in the Regional Plan: Water. It did not include reference to the NES-F regulations. However, the following paragraph stated that:

The NESFW, which comes into force on the 3rd of September 2020 introduces additional rules relating to activities affecting natural wetlands, and the reclamation of rivers. While not currently in force, the following provisions of the NESFW are noted:

48 The following paragraph identified that certain works were a non-complying activity under regulations 52-54, discretionary activity under regulation 57 and restricted discretionary activity under regulation 39, requiring resource consent. On this basis, it was concluded that:²³

various activities trigger either prohibited or non-complying status under regulations 52, 53, and 54 of the NES-F where they result in the partial or complete drainage of natural wetlands. As outlined in section 7.2 above, the NESFW comes into force on the 3rd of September 2020,

²⁰ Assessment of Environmental Effects for Updated Design, August 2020, p 70, section 7.2.

²¹ Assessment of Environmental Effects for Updated Design, August 2020, p 70, section 7.2.

²² Assessment of Environmental Effects for Updated Design, August 2020, p 71, section 7.2.1.

²³ Assessment of Environmental Effects for Updated Design, August 2020, p 76, section 7.2.2.

which is after the date of the lodgement of these applications. Therefore, under section 88A of the RMA, the discretionary activity status at the time the applications were made remains unchanged.

- 49 The application then stated that a consent duration of 35 years was sought for the following activities:
- Taking and use of groundwater, and taking of surface water.
 - Diversion of surface water.
 - Damming of surface water.
 - Discharges of stormwater and contaminants to land and water.
 - Discharge of contaminants to air.
- 50 It also sought an unlimited consent duration for the land use consents for the drilling of land.
- 51 The Original Application then assessed the effects of the activities. Table 10 in section 8.0 set out the relationship of the effects to the consents applied for. It does not identify NES-F consents. However, as the application earlier identified that ORC administers the NES-F, reference to 'ORC consents' would include consents required under the NES-F.
- 52 The original application was amended in May 2021. A track change version of the AEE was lodged with the Council together with responses to further information requests. The language in the application was amended to confirm that the NES-F had come into force and that where the rules of the NES-F resulted in a more stringent activity status, section 88A of the RMA provides that the status of the activities at the time the applications were made remains unchanged.
- 53 The ORC Notification Recommendation Report clearly set out the relevant NES-F requirements in section 6.2 and concluded in section 6.3 that the various resource consent applications are to be bundled, and considered as a discretionary activity.²⁴
- 54 The amended application was publicly notified on 18 September 2021.
- 55 The amended application was further amended on 7 April 2022 to realign the proposed road carriageway to avoid any direct impact on

²⁴ ORC Notification Recommendation Report, 13 September, 2021, section 6.2 and 6.3.

wetlands located alongside McLaren Gully Road and thus a prohibited activity status under the NES-F.

Can the Hearing Panel grant resource consent under the NES-F?

- 56 A resource consent authorises an activity. It does not authorise a breach of a particular rule.²⁵ In addition, section 104(5) provides that a consent authority may grant a resource consent on the basis that the activity is a controlled activity, restricted discretionary activity, a discretionary activity or non-complying activity, regardless of what type of activity the application was expressed to be for.
- 57 The Application was made after the NES-F was Gazetted but before it commenced. The relevant provisions of the NES-F existed, but were not yet in force. Therefore, the application did contain an assessment of the proposal against the relevant provisions of the NES-F because the provisions did exist.
- 58 An Environment Court case involving the Mt Messenger Bypass briefly considered whether the Court could grant consents under the NES-F where the application and hearing had occurred prior to the NES-F being Gazetted.²⁶ In that case, the Court found that it did “not consider that it is possible in a jurisdictional sense to grant consent for an activity for which no consent was required as at the date the resource consent application was filed, notwithstanding the reference in the AEE to the application being for all resource consents required for the Project under the regional rules noted and any other rules which may apply to the Project even if not specifically noted”.²⁷ The Court concluded that:²⁸

... for there to have been a valid application for the consents required in the NES Freshwater (being other regulations), the application documents must have assessed the proposal against the relevant provisions of those regulations. It has not done so in this case as the NES Freshwater was not in existence at the time the application was filed. For these reasons we do not consider that the Court has jurisdiction to grant any further consent (assuming that further consents are, in fact, needed – we have not undertaken an independent assessment of that) required under the NES Freshwater. Further, we

²⁵ This conclusion of the Environment Court in *Arapata Trust Ltd v Auckland City Council* [2016] NZEnvC 236 was expressly endorsed by Venning J in *Duggan v Auckland Council* [2017] NZHC 1540. Doogue J in *Marlborough District Council v Zindia Limited* [2019] NZHC 2765 agreed with these authorities that the proper interpretation of a resource consent is a permission to do an activity, or in the case of a land use consent comprising multiple activities, to use the land in the way consented.

²⁶ *Director-General of Conservation v Taranaki Regional Council* [2021] NZEnvC 27.

²⁷ *Director-General of Conservation v Taranaki Regional Council* [2021] NZEnvC 27 at [53].

²⁸ *Director-General of Conservation v Taranaki Regional Council* [2021] NZEnvC 27 at [54].

do not consider that it is appropriate to amend the conditions to address NES Regulations – the Regulations require compliance with certain matters not explored with the Court during the hearing.

- 59 On its face, the case suggests that consent may not be able to be granted under the NES-F for applications lodged before the NES-F was Gazetted. However, the Court's comments need to be read in context:
- (a) The case involved applications for regional consents, alongside a Notice of Requirement for a large roading project. The NES-F consents were requested after the application was heard, by way of a memorandum filed with the Court.
 - (b) The applicant considered that the relevant activities within the NES-F had been incorporated within the consents sought for the proposal to date and so did not seek to amend the AEE (or supplementary reports or evidence that had been presented to the Court) to provide analysis as against the NES-F.
- 60 In contrast, in the case of the Smooth Hill Landfill, the Application was lodged after Gazetted of the NES-F. Therefore, it included an assessment against the relevant provisions of the NES-F. The matters that must be complied with in the NES-F have been explored in the application and in this hearing. Given these key differences, this Application can be distinguished from the decision referred to above.
- 61 The Application did not explicitly state that consent was sought under the NES-F. However, it did refer to the relevant regulations and provided an assessment against the relevant requirements. The assessment of effects and further information provided in response to requests from Council addressed all the effects that the NES-F would contemplate an applicant assess. The amended application reduced the extent of the proposal and its impact on wetlands. Impacts on wetlands were further reduced by the amendment to the application to realign the road in April 2022.
- 62 The Application is seeking consents for a proposal, not breaches of a particular rule. In my submission, not including a sentence that explicitly states that consent is being sought under the NES-F is not fatal. The application is clear enough on its face that consents are required under the NES-F. Further, it addressed the implications of the NES-F for the activity status of the application, which would be irrelevant unless resource consent was required.

63 If the Applicant confirms that it is seeking resource consent under the NES-F in my submission it is within the Hearing Panel's jurisdiction to grant those resource consents.

If resource consents are not being sought under the NES-F, should the Application be deferred under section 91 of the RMA?

64 Section 91 provides that a consent authority may determine not to proceed with the hearing of an application for a resource consent if it considers on reasonable grounds that:

- (a) other resource consents under the RMA will also be required in respect of the proposal to which the application relates; and
- (b) it is appropriate, for the purpose of better understanding the nature of the proposal, that applications for any 1 or more of those resource consents be made before proceeding further.

65 Ms Irving acknowledged, that if the Application was deferred to enable the Applicant to make an application under the NES-F, it would not yield anything new however, a change of activity status changes the nature of the assessment.

66 The purpose of section 91 is to allow the effects of any one proposal to be comprehensively considered (by considering all necessary resource consents at the same time).²⁹ The question then is whether it is appropriate in this case for a new application to be made, to better understand the nature of the proposal. In my submission, a change in activity status alone would not provide the Council or Panel with further information that would assist with the comprehensive consideration of the effects, as there would be no change in effects. In any event, a consent authority can grant a resource consent on the basis that the activity is a different activity status to that which was applied for (RMA, s 104(6)). In this case, an additional application that would not yield any further assessment of effects would not change the Council's assessment.

67 In my submission, there are not reasonable grounds to defer the hearing of this Application under section 91 of the RMA.

²⁹ *Zwart v Gisborne District Council* [2014] NZEnvC 96, at [19].

What is the activity status of the application?

- 68 Under section 43B(5) and (6) of the RMA, the following permits and resource consents prevail over a national environmental standard **(NES)**:
- (a) A land use or a subdivision consent granted under the district rules before the date on which a NES standard is published under the Legislation Act 2019.
 - (b) A coastal, water, or discharge permit or land use consent granted in relation to a regional rule before the date on which a relevant NES is published under the Legislation Act 2019.³⁰
- 69 Section 43B(7) applies to other resource consents and provides that:
- The consent prevails over a national environmental standard if the application giving rise to the consent was the subject of a decision on whether to notify it before the date on which the standard is published under the Legislation Act 2019. However, the consent does not prevail if the standard expressly provides otherwise.
- 70 Counsel for Forest & Bird submits that the intent of section 43B(7) is to protect a consent applicant's position so long as a notification decision was made prior to the NES-F's notice in the Gazette. Without that notification decision the application has no protection, and the standard has full effect. Mr Jennings submits that section 43B(7) prevails because the decision to notify the Application came after the NES-F was published and since the NES-F prevails, regulations 52 and 54 have full force and the most stringent activity status for the Application is non-complying.
- 71 In my submission, section 43B(7) seeks to protect an applicant with an application that was the subject of a notification decision before the Gazettal of an NES from needing to apply for additional resource consents under the NES if an NES subsequently introduces more stringent requirements than the rules in the relevant plan existing at the time the notification decision was made. The application may continue to be processed and if granted, the consent for the relevant activity will prevail over any additional requirements in an NES (unless the NES

³⁰ Until a review of the conditions of the permit or consent under section 128(1)(ba) results in some or all of the standard prevailing over the permit or consent (section 43B(6A)).

expressly provides otherwise which the NES-F does not). However, section 43B(7) does not affect the operation of Section 88A.

72 Section 88A of the RMA provides that the activity status of an application is preserved as at the time that the application is lodged if, after lodgement, the status of the application is changed in any of the ways set out in section 88A(1)(b):³¹

- (1) Subsection (1A) applies if –
 - (a) an application for a resource consent has been made under section 88 or 145; and
 - (b) the type of activity (being controlled, restricted, discretionary, or non-complying) for which the application was made, or that the application was treated as being made under section 87B, is altered after the application was first lodged as a result of –
 - (i) a proposed plan being notified; or
 - (ii) a decision being made under clause 10(1) of Schedule 1; or
 - (iii) otherwise.

(1A) The application continues to be processed, considered, and decided as an application for the type of activity that it was for, or was treated as being for, at the time the application was first lodged.

(2) Notwithstanding subsection (1), any plan or proposed plan which exists when the application is considered must be had regard to in accordance with section 104(1)(b).

73 In this case, the activity status of the proposal at the time the Application was lodged was discretionary. Following, the commencement of the NES-F, the activity status of the proposal, would have been non-complying.

74 While there is no reference to an NES in section 88A(1)(b), the catch-all reference to activity status being changed “otherwise” is broad.³² It

³¹ RMA, s 88A.

³² RMA, section 88A(1)(b)(iii).

provides that section 88A applies where the activity status of an application changes in any way in accordance with the RMA. This would include where the NES-F introduces an additional restriction.

- 75 Further, the promulgation of a national environmental standard that introduces an additional restriction is analogous to the notification of a proposed plan introducing a new restriction. In *Infinity Investment Group Holdings Limited v Canterbury Regional Council* the Environment Court considered the latter scenario in detail and concluded that section 88A protects activity status where a proposed plan was notified after an application for resource consent was lodged.³³
- 76 I do not agree with Mr Jennings' submission that to accept this interpretation would require the complete dismissal of section 43B(7). Section 43B(7) applies to whether a resource consent prevails over an NES, not the position regarding activity status under section 88A.

Dated this 24th day of May 2022



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M A Mehlhopt
Counsel for Otago Regional Council

³³ *Infinity Investment Group Holdings Limited v Canterbury Regional Council* [2017] NZEnvC 35.