

**BEFORE THE COMMISSION  
APPOINTED BY THE OTAGO REGIONAL COUNCIL**

**UNDER** the Resource Management  
Act 1991 (RMA)

**IN THE MATTER** Of an application by Dunedin  
City Council for resource  
consent being processed with  
reference RM20.280

**BIG STONE FORESTS  
LIMITED, ŌTOKIA CREEK  
AND MARSH HABITAT  
TRUST, SOUTH COAST  
NEIGHBOURHOOD SOC  
INC, BRIGHTON SURF  
LIFESAVING CLUB INC,  
DAVID GRANT**

**(‘The Submitter Group’)**

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**FURTHER POINTS OF COUNSEL FOR SUBMITTER GROUP**

**DATED 24 MAY 2022**

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## **FURTHER POINTS OF COUNSEL FOR THE SUBMITTER GROUP**

### **May it please the Commissioners:**

1. There are some matters that have been raised during the course of the hearing so far that I wish to just raise on behalf of the Submitter Group.

### **Community Liaison**

2. The Commission put a question to Ms Graham regarding a community liaison committee.
3. It submitted that any commitments to community engagement associated with the exercise of this consent in future cannot be relied upon unless conditions are imposed.
4. The submitter groups experience of Council engagement to date have been average at best and they consider that consent conditions requiring the establishment and operation of an Liaison Group would provide a useful and enforceable framework for more clarity and transparency between the community and the Council on this project.
5. It is Counsel's experience that such groups are a useful tool and if a project is run well there is a lot of work initially and during construction and early operation phases, and this reduces as the activity settles down. They can empower the community by providing an avenue for expressing concerns and having those concerns addressed and create a virtuous cycle that supports continual improvement in the operation of the relevant activity.

### **Water Quality monitoring**

6. I must confess to being very perplexed by the responses of Mr Kirk to questions about the establishment and operation of trigger levels for monitoring of water quality.
7. As I understood it the intention is to create a moving target by way of trend analysis. Mr Rumsby and Mr Ife will address the technical aspects of the monitoring and trigger level regime in greater detail,

but from my perspective I think it important to reiterate the view that the conditions of this consent need to establish the environmental and operational performance criteria that must be met by the landfill.

8. Without clear and enforceable standards enshrined in the conditions the nature of the activity and the potential effects of it are not certain. This applies to factors such as:
  - a. The size of the open tip face (which I understand Mr Coombe has confirmed should be limited to 300m<sup>2</sup>)
  - b. The treatment of putrescible wastes
  - c. Clear waste acceptance criteria
  - d. Clear environmental performance criteria to measure compliance against
  - e. Controls on Landfill Gas concentrations to address fire hazard risk
  - f. Clear standards, objectives and processes for the construction, operation and maintenance of the key elements of the landfill's containment infrastructure.

#### **Matters raised by Forest and Bird**

9. Counsel has had an opportunity to review the legal submissions filed on behalf of Forest and Bird. To assist the panel, I take a slightly different view about the effect of section 43B.
10. In my opinion section 43B does not operate to override the operation of section 88A. However, section 43B does operate as Forest and Bird say in that it requires the NES resource consents to be sought by the Council under the NES-FW. In my view from the face of the application no such application has been made. And nor could it have been as the application was filed prior to the NES coming into force.

11. The original application does not list the NES provisions in Table 8 which sets out the 'resource consents required from the Otago Regional Council'. The application then simply 'notes' the NES.
12. The public notice does not refer to consents being made for the relevant activity under the NES.
13. The amended application does not include an updated Table 8. The only difference is that the NES provisions are identified and said to be 'relevant'. The language is opaque at best and in my view does not amount to applications being made under the National Environmental Standard. At the time that the amended application was filed it was abundantly clear that the NES consents were required. They should have been added to Table 8 and notified.
14. It is submitted that the purpose of section 43B(7) is to ensure that new national regulations get implemented as quickly as practically possible by capturing activities that may have just been applied for, but not yet notified. Such is the case here.
15. This then requires the panel to consider whether this matter needs to be deferred pursuant to section 91 whilst the Applicant makes the necessary applications pursuant to the NES.
16. Section 91 states:
  - (1) *A consent authority may determine not to proceed with the notification or hearing of an application for a resource consent if it considers on reasonable ground that –*
    - a. *Other consents under this Act will also be required in respect of the proposal to which the application relates; and*
    - b. *It is appropriate, for the purposes of better understanding the nature of the proposal, that applications for any one or more of those other resource consents be made before proceeding further.*

17. In considering whether a deferral is necessary I think it is important that you consider the nature of the regulatory framework that the NES forms part of.
18. It is a creature of the National Policy Statement for Freshwater Management. As has been said many many times, this policy statement and its associated regulatory tools represent a 'paradigm shift' in freshwater management. To allow the Applicant in this case to dodge that regime risks undermining the purpose of the NPSFW.
19. Further, the need for applications under the NES fundamentally changes the decision-making framework for this proposal. It makes the proposal a non-complying activity and subjects it to the higher threshold tests under section 104D. It is no mere technicality and in my opinion is fundamental to your understanding of the nature of the proposal with respect to the full decision-making regime under the Act.
20. I further submit that this issue is still a ground for declining consent pursuant to section 104(1)(b). The strident approach that the NPS and NES has taken with respect to wetlands should not be ignored. This is made explicit in section 88A with respect to plans and proposed plans (section 88A(2)), but equally applies in relation to a new National Policy Statement and associated Environmental Standard. I think that is really the effect of the Forest and Bird position. Which is to say that this application would now be a non-complying activity. In light of the conclusions in the section 42A report this is an insurmountable hurdle and must result in consent being declined.

### **Consequential effects**

21. During the course of questions the Commission asked whether effects on the coastal environment and therefore the NZCPS would be relevant. It is submitted that they are because of the evidence of bioaccumulation risk downstream in the Otokia Estuarine environment. This topic was traversed further by Mr Lloyd.

22. The relevant case in this instance is *Clutha District Council v. Otago Regional Council* [2021] NZHC 510. The case involved an application to take water from the Clutha/ Mata-Au for a community water supply, which also provided supply to a number of rural properties, including those that used water for dairy shed washdown. The use of the water for these purposes was a permitted activity.
23. The Environment Court had fixed the duration of the permits at 25 years (as opposed to the 35 sought) in part because of the use for dairy shed washdown and the potential for this activity to give rise to adverse environmental effects.
24. On appeal to the High Court the Council argued that this was an error because the effects of using water for dairy shed washdown were too remote to be considered and effect of the water permit sought. The High Court reached the following conclusion:

*[51] So, the Environment Court in this case was required to consider the environmental effects of the consented activity because they were relevant to determining the appropriate duration of the consent. Provided there was a sufficient nexus between consequential effects and they were not too remote, they had to be considered by the Environment Court for the purpose of promoting “the sustainable management of natural and physical resources”. They could not be ignored by the Environment Court simply because the consequential use of the water and its effects was subject to management under the RMA and by the Regional Council in accordance with ss 15 and 30(f) of the RMA.*

*[52] I consider the end use of water for dairy shed wash and its subsequent discharge to the environment had a sufficient nexus to the take and were not so remote as to be matters which the Environment Court could not consider when fixing the duration for the water take consent for the scheme. The Court therefore had to have regard to these effects under s 104(1)(a) of the RMA.*

25. It is submitted that the circumstances of the present consent are less remote than the circumstances of *Clutha DC v. Otago RC* as the effects on the downstream freshwater and estuarine environments

arises from the discharge for which consent is being sought. There is no intervening regulatory control in this instance.

26. It is further submitted that if the Commission accepts that effects associated with bioaccumulation may occur with these downstream environments (some of which are coastal environments) the NZCPS is therefore engaged. Such approach would be consistent with identified Kai Tahu values, ki uta ki tai<sup>1</sup> (from the mountains to the sea), the integrated management<sup>2</sup> policy direction within both the partially operative Regional Policy Statement and Proposed Regional Policy Statement 2021.
27. Counsel notes that the concept of integrated management, and in particular ki uta ki tai is central to freshwater management in the Proposed Regional Policy Statement 2021. Counsel agrees with the evidence of Mr Dale, that more weight should be attributed to the Proposed Regional Policy Statement 2021 freshwater provisions (and the integrated management provisions) given it has been developed to give effect to the NPSFM.

#### **Request for Quantitative Public Health Assessment**

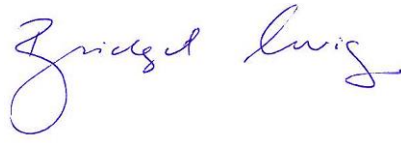
28. The Submitter Group are very supportive of this request, however it seeks to ensure that the instructions given cover the field. To that end the submitter group request that the Council be directed to provide a copy of the instructions to be given to the experts and a list of the information that will be provided to them in the first instance.
29. It is the submitter groups view that this information must include the evidence of Mr Rumsby, Mr Ife and Dr Lloyd to ensure that the concerns raised by the submitters can be understood and hopefully addressed by the report.

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<sup>1</sup> Partially Operative Regional Policy Statement Part D, Schedule 1A, proposed Regional Policy Statement 2021 page 51 and Page 53 Coastal Environment, which discusses the coastal environment being the receiving environment for freshwater from the terrestrial environment.

<sup>2</sup> See Policy 1.2.1 of Partially Operative RPS, IM-O2 Ki uta ki tai, IM-M1 (5), LF-WAI-P3 – Integrated Management/ Ki uta ki tai, LF-VM-O7 Integrated Management Proposed Regional Policy Statement

Dated 24 May 2022

A handwritten signature in blue ink, appearing to read "Bridget Irving". The signature is written in a cursive style with a large initial 'B'.

Bridget Irving

Counsel for The Submitter Group