

Tabled at Hearing 13/03/2013

BEFORE THE CANTERBURY REGIONAL COUNCIL

IN THE MATTER of the Resource Management
Act 1991

AND

IN THE MATTER of a hearing by the
Canterbury Regional Council
Hearing Panel on the
proposed Canterbury Land
and Water Regional Plan

**LEGAL SUBMISSIONS FILED IN ADVANCE OF HEARING FOR
TRANSPower NEW ZEALAND LIMITED**

Appearance date at hearing: 13 March 2013



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INTRODUCTION

1. These legal submissions are filed on behalf of Transpower New Zealand Limited and address the key matters raised in Transpower's submission and further submission. Evidence for Transpower has been lodged by:
 - (a) Andrew McMahon (Asset Engineering Stations Manager); and
 - (b) Jane West (Consultant Planner).

2. Transpower is the owner and operator of the National Grid, which comprises approximately 12,000 km of transmission lines and over 170 substations. The proposed Canterbury Land and Water Regional Plan (pLWRP) contains objectives, policies and rules that affect this infrastructure within the Canterbury region. It is essential for Transpower that the resource management framework it operates within is sound, transparent, and workable in terms of the key issues that will impact on its ability to operate, maintain, develop and upgrade its nationally significant electricity transmission network.

3. There is general support for the objective/policy framework of the pLWRP, and in particular Transpower recognises the need to protect against the potential for adverse effects to impact on land and water as a result of contaminated land. These submissions focus on Transpower's key areas of concern that relate primarily to particular rules, and can be summarised as:
 - (a) the relationship of stormwater and wastewater discharge provisions and sites identified as "potentially contaminated land";
 - (b) the relationship of earthworks and sites identified as "potentially contaminated land"; and
 - (c) the relationship of earthworks provisions and groundwater levels.

4. It is noted that several matters of concern have been adequately addressed in the Officers' Report and recommendations, although some substantial areas of concern remain. These submissions will focus on those outstanding issues.

RELEVANT STATUTORY FRAMEWORK

Planning hierarchy

5. A number of documents are relevant to Transpower and its submission on the pLWRP, including the Electricity Act 1991, the National Policy Statement on

Electricity Transmission Activities (**NPSET**), the Resource Management (National Environmental Standard for Assessing and Managing Contaminants in Soil to Protect Human Health) Regulations 2011 (**Contaminants NES**), the Resource Management National Environmental Standards for Electricity Transmission Activities) Regulations 2009 (**NESETA**), the Canterbury Regional Policy Statement (**RPS**), the Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2012 (**ECan Act**), and the Canterbury Water Management Strategy (**CWMS**).

6. These documents prescribe a hierarchy of legislation and policy in order to protect the nationally and regionally significant infrastructure. As required by section 67 of the Resource Management Act 1991 (**RMA**), the pLWRP must *give effect to* the NPSET and also the RPS, which is an important starting point for considering, in particular for the purposes of these submissions, the approach to contaminated land management in the Canterbury Region.
7. Policies 16.3.4 and 17.3.3 of the RPS are of particular relevance. Policy 16.3.4 encourages a reliable and resilient electricity transmission network, with:
 - (a) 16.3.4(1) requiring that particular regard be given to the local, regional and national benefits when considering operation, maintenance, upgrade or development of the electricity transmission network; and
 - (b) 16.3.4(3) enabling the operation, maintenance, upgrade and development of the electricity transmission network subject to two matters: (i) that the adverse effects on significant natural and physical resources or cultural values are avoided, or where this is not practicable, remedied or mitigated, and (ii) that other adverse effects on the environment are appropriately controlled.
8. Policy 16.3.4(3) is notably lenient towards works on the transmission network so long as adverse effects on significant natural or physical resources are avoided. Even then, the policy acknowledges that where this is not practicable, it is acceptable for those effects to be remedied or mitigated.
9. Policy 17.3.3 is of particular note when addressing the key issues of environmental risk and considering the appropriate triggers to require resource consent. This policy deals with contaminants in land and provides that contaminants should only be allowed to remain in the ground if discharges of contaminants beyond the site to air,

water or land will not result in significant risk to human health or the environment. Ms West's evidence is that there is a clear alignment between the NPSET and the RPS, and that the RPS gives effect to the NPSET on the matter of nationally and regionally significant infrastructure, in accordance with section 62(3) of the RMA.

10. It is submitted however that the proposed rules of the pLWRP do not align with the approach to contaminated land management set out in the RPS.
11. The Contaminants NES has established comprehensive and consistent planning controls to ensure that land is made safe for human use at the time of development (triggered by disturbance, subdivision and land use). The Contaminants NES regulations deal with territorial authority functions under section 31 of the RMA, not regional council functions under section 30. Although it is appropriate for regional policies and rules to help set the framework for the district and city plans for health on these matters, it is not necessary to replicate those regulations, or to set more onerous requirements than set out in the Contaminants NES. While Transpower considers it appropriate that the Canterbury Regional Council (**CRC**) has sought to address this issue in the pLWRP (rather than simply remain silent and rely on section 15 of the RMA), it is submitted that the way that the proposed rules address the issue can readily be improved.

Section 32

12. Section 32 of the RMA is a statutory test of the merits of provisions of a proposed plan, essentially requiring an examination of the extent to which each objective is the most appropriate way to achieve the RMA's purpose. This test includes whether the policies, rules or other methods are the most appropriate for achieving the objectives. The case law on the application of section 32 is largely settled and there is no need to repeat it here in these submissions. Section 67(1) also requires that the policies must implement the objectives, and that the rules (if any) are to implement the policies.
13. As mentioned earlier, Transpower generally supports the relevant objectives in the pLWRP. Except for a change sought to Policy 4.23 to better distinguish the relationship between the site that contains contaminated land, and the environment outside the boundary of the site, the relevant policies are also supported by Transpower. Ms West's evidence highlights where there are more appropriate ways for the policies and rules to achieve the objectives.

14. The key question in Transpower's view, is whether the policy and rule framework proposed by Transpower, that is directed towards recognising the national significance of the need to operate, maintain, develop and upgrade the electricity transmission network, better achieves the purpose of the RMA and the objectives and policies of the RPS and the NPSET, than the equivalent rules notified in the pLWRP.

APPROACH TO POTENTIALLY CONTAMINATED LAND

15. Many rules in the pLWRP¹ contain a reference to "potentially contaminated land" within the conditions that exclude activities on and uses of such land from permitted activity status. The proposed provisions capture activities based simply on whether the site is potentially contaminated and take no explicit account of the risks of contaminants being remobilised, transported off the site, or entering ground or surface water. Such an approach is submitted to be overly onerous, and would prevent any Transpower substation or switchyard site from achieving compliance.
16. When considering how this would apply to Transpower's substation sites throughout the Canterbury region, it needs to be remembered that these are existing sites of longstanding, which accommodate substantial and nationally significant assets which form a critical part of the country's electricity transmission network. They are essentially passive, are very conservatively managed, and pose environmental risks which are very low. The reality is that such sites cannot stop operating without very serious consequences for electricity supply and the national economy. It is submitted however that the proposed rule approach in the pLWRP simply does not "fit" these sites and assets, or the circumstances in which they are managed and operated by Transpower.
17. The proposed rule framework does not acknowledge mitigation measures such as bunding, capping, or the use of oil interceptors. Mr McMahon's evidence describes in detail the practicable steps that Transpower takes to minimise and contain oil leakage from its assets, including substations. He concludes that there is only a very small chance of an oil spill from Transpower's equipment, and even if there is a spill, mitigation measures such as oil containment bunds, oil containment tanks, oil treatment processes, oily water separators and float switches / high level alarms significantly mitigate the likelihood of any oil leakages into surrounding land or water. Mr McMahon also describes the number of internal standards relating to oil services that Transpower is required to comply with. Transpower simply cannot afford to have

¹ See Rules 5.7, 5.9, 5.55, 5.69, 5.72, 5.76 and 5.77.

problems with these assets, otherwise there would be significant problems for the effective operation of the National Grid.

18. Therefore in the case of Transpower's substation sites, although there are large volumes of potential contaminants on the site and soil contaminants could be present that exceed background levels, mitigation measures exist on the sites such as bunding and containment, along with operational guidelines, which manage the risk of contaminants being transferred to the soil and beyond the boundary to other sites. In most instances the sites have been in existence for many years, are largely passive, and do not pose a significant environmental risk. Had there been any issues with contaminant discharges from these sites, it is submitted that they would have become evident by now.

19. One solution to the undue level of regulation is to delete the references in the pLWRP to "potentially contaminated land" within the relevant rules. An alternative solution (and it is submitted to be the most appropriate) would be to insert an exception by acknowledging regionally significant infrastructure and the good practice associated with such sites². This approach also achieves greater consistency with the RPS policies, and will give better effect to the NPSET with regard to providing for sustainable, secure and efficient electricity transmission. An exception to a rule would be straightforward and easy to identify in any given situation.

20. The alternative relief suggested in the Officers' report is to insert an exception within Rule 5.7 for contaminated or potentially contaminated land "*where a discharge permit or land use consent for storage of hazardous substances exists*". It is submitted that this approach is problematic and will be difficult to administer. For example:
 - (a) is the discharge permit for stormwater, wastewater or some other contaminant discharge?;
 - (b) does the rule take into account other land use consents for the storage of hazardous substances that may also be required from the territorial authority?;
 - (c) why should a permitted activity under the NRRP not also deserve an exemption?; and

² See paragraph 6.6 of Ms West's evidence.

- (d) how would it address longstanding sites or activities such as substations which may have been established without the need for such permits or consents to be obtained?
21. Finally the Officers' suggested relief will not address the principal issue, as it is only specific to Rule 5.7 and not to the other rules that contain a reference to "potentially contaminated land" within the conditions that exclude such land from permitted activity status.

STORMWATER DISCHARGE

22. A specific example of Transpower's concerns with the overall approach taken in the pLWRP to contaminated land, is Rule 5.72. This rule allows for the discharge of stormwater into a river, lake, wetland or artificial watercourse or onto or into land in circumstances where a contaminant may enter water as a permitted activity, provided a number of conditions are met. One of the conditions that excludes permitted activity status, is that discharge is not from or onto potentially contaminated land. Transpower would therefore be required to seek a non-complying resource consent for stormwater discharges, given that a substation is considered a HAIL site and therefore "potentially contaminated".
23. At a higher level, it is Ms West's evidence³ that a non-complying activity status infers a generally inappropriate activity, and a need to make an exceptional case for the granting of consent. Given the comprehensive and responsible management and control of Transpower's sites as described by Mr McMahon, the various spill mitigation measures in place, and the fact that they are part of regionally and nationally significant infrastructure, it is submitted that non-complying is an inappropriate activity status.
24. Further a jump from permitted straight to a non-complying activity status is also considered incongruous. It ignores the fact that there are always various degrees of non-compliance, and it also does not give effect to the NPSET or RPS policies nor allow for the efficient operation of those assets.
25. If the deletion of the words "potentially contaminated land" in Rule 5.72(2) is not accepted by CRC, it is again sought that a specific exception be provided (as

³ At paragraph 7.3.

discussed earlier). This provides more specific relief by acknowledging regionally significant infrastructure and the good practice that is associated with such sites.

26. The provisions proposed by Transpower are more appropriate and will better give effect to the NPSET and RPS with respect to national and regionally significant infrastructure. They will not undermine the intent of the rules with respect to minimising the potential adverse effects surrounding potentially contaminated land.
27. Further, Policy 17.3.3 of the RPS clearly recognises that contaminants can remain in the land where discharges of contaminants beyond the site are not likely to result in significant risk to human health or the environment. It is submitted that Rules 5.72 and 5.73 as proposed do not give effect to this policy, particularly as they apply to Transpower's substations and switchyard sites.
28. Overall, where a site has resource consent (or permitted activity status under the NRRP) and the appropriate measures in place, it is submitted to be an undue burden to require additional stormwater discharge consents for the existing sites as non-complying activities (quite apart from the rules failing to recognise the higher level policy considerations that apply to electricity transmissions activities or the manner in which such sites are operated and managed).

WASTEWATER DISCHARGE

29. Rule 5.7 controls the discharge of wastewater from an existing on-site wastewater treatment system onto or into land in circumstances where a contaminant may enter water as a permitted activity. One of the permitted activity conditions is that the discharge not be onto or into land that is potentially contaminated, and it is this aspect that triggers the need for (restricted discretionary) consent for ablution facilities on Transpower's substation and switchyard sites.
30. This trigger arises because most of Transpower's substation sites are in remote and unserviced areas without the ability to connect to Council infrastructure. Such sites are generally unmanned and have existing wastewater systems to provide for ablution facilities that are used on an irregular basis, such as during inspection and maintenance activities. There is very limited risk that the on-site effluent disposal will mobilise the relevant HAIL contaminants.
31. It is therefore submitted that there should be no need for a consent – it is unnecessary in terms of the mitigation of effects. Where there are existing sites, and

where permits are already in place, it is submitted that it is unreasonable and inappropriate to require another discharge consent to be sought, bearing in mind the likely effects.

32. It is submitted that there is also a need to remove the "Septic Tank Suitability – Area A" from the planning maps (related to another permitted activity condition). Only four of Transpower's substations are located with this Septic Tank Suitability area, meaning the remaining 18 would require a discharge permit as a restricted discretionary activity under Rule 5.8.
33. The Officers' report recognises a number of issues with the Tank Suitability area. A number of Septic Tank systems have recently been established under the NRRP provisions as permitted activities. The Tank Suitability area has also been opposed by other submitters for a number of technical reasons such as the basis on which the map has been developed, and the criteria used for developing it.

EARTHWORKS AND EXCAVATIONS

34. The rule framework for earthworks and excavations includes non-complying activity status for non-compliance with Rule 5.155. That rule provides for the use of land to excavate greater than 100m³ of material within any 12 month period over an unconfined or semi-confined aquifer as a permitted activity. One of the conditions requires the excavation to be no deeper than 1 m above the highest known groundwater level for the site, and that it shall not be within 50m of a river, lake or wetland, or within the Christchurch Groundwater Protection Zone.
35. Transpower has transmission structures located both within 50m of, and in the beds of lakes and rivers. These structures, including their foundations, need maintenance over the life of the infrastructure, which is specifically recognised in the NPSET. It is submitted that the 100m³ volume is not always appropriate, and non-compliance would require consent as a restricted activity under Rule 5.156. The necessary earthworks are at times discrete and localised, and therefore may not hit the 100m³ threshold, however there is no change in the level of effects.
36. Where the excavation is in or above the Coastal Confined Gravel Aquifer System, the excavation is a permitted activity subject to there being at least 1 m of undisturbed material between the base of the excavation and Aquifer 1, and that the excavation does not occur within 50 m of a river, lake or wetland. Given the depth of existing transmission tower foundations is approximately 6 to 8 m, compliance with Rule

5.157 cannot be achieved for fundamental maintenance activities, resulting in the need for a non-complying consent. Transpower does not carry out such maintenance activities unless they are necessary and the asset is at risk, and a rule which makes maintenance of nationally significant activities non-complying is submitted to be at odds with the higher level policy instruments which seek to enable such necessary maintenance to take place.

37. Given the regional and national significance of Transpower's network, and the importance of adequate upgrade and maintenance of it, it is submitted that a non-complying activity status cannot be appropriate, nor can it give effect to the NPSET. Further, the policy framework would make the granting of consent under the threshold tests of section 104D difficult to argue. Although it is more than likely that the minor effects gateway test would be met in most cases, it is submitted that it is not appropriate for a decision maker to have to decide this point, for a consent for routine maintenance on this type of infrastructure.
38. Transpower has proposed various relief, however the recommendations in the Officers' report on this point are noted and are considered acceptable – two rules, with a re-write of Rule 5.155 that results in the 100m³ limit being included as a condition within the Rule, and Rule 5.156 requiring resource consent for a restricted discretionary activity where there is non-compliance with any of the conditions in Rule 5.155.
39. This solution would also relieve the current inconsistencies with Policy 16.3.4 of the RPS, which encourages a reliable and resilient electricity transmission network, and enables the operational, maintenance, upgrade and development of the network provided that adverse effects are avoided, remedied or mitigated.

OTHER MATTERS

Site dewatering

40. Dewatering is a temporary activity that usually takes place during construction works. Rules 5.92 and 5.93 are supported, but an amendment is sought to the wording of Condition 7 of Rule 5.92.
41. Condition 7 currently requires that the concentration of suspended solids in any discharge to a surface water body to not exceed 50g/m³. Other rules that seek to control the suspended solids in a discharge have adopted no more than 100g/m³

(see Rules 5.92(6)(b)(ii) regarding stormwater and Rule 5.150(4)(b) regarding vegetation clearance and earthworks in erosion-prone areas).

42. It is submitted that there is no reason to have a different suspended sediment concentration for dewatering, particularly when dewatering is only a temporary activity. It is noted that the Officers' Report appropriately recognises this point.

Gravel extraction and vegetation burning

43. The pLWRP sets a permitted threshold for excavation near transmission towers and poles (Rule 5.125). Objective 3.20 is concerned with the extraction of gravel from riverbeds and includes the need to protect infrastructure, however the policy on gravel removal does not recognise and require the protection provided for in the rule or objective. The same applies with vegetation burning as a land management tool.
44. It is submitted that it would be appropriate for the relevant policies (4.91(b) and 4.18 respectively) to require consideration of such effects to be taken into account when issuing permits. This would alert those using the pLWRP to the issue of excavation and vegetation burning in close proximity to such infrastructure. Further, it would allow the matter to be taken into consideration when assessing resource consent applications.

West Melton Sub-regional Area

45. Transpower's submission addresses Policy 9.4 within the West Melton Sub-Regional Area of the pLWRP. That part of its submission will be dealt with separately in Hearing Group 3.

SUMMARY

46. The key points that can be taken from Transpower's submission are that:
- (a) the proposed rules do not align with the approach to contaminated land management set out in the RPS;
 - (b) the proposed rules do not give effect to the NPSET;

(c) the policies and rules proposed by Transpower, rather than the equivalent provisions in the pLWRP, are superior in meeting the relevant statutory tests for regional plan provisions.

47. Both counsel and witnesses will be prepared to address any issues arising from evidence and submissions at the allotted hearing slot on 13 March.

DATED this 11th day of March 2013



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TO: Hearings Officer, Christchurch Regional Council

AND TO: Hearings Commissioners