

IN THE MATTER

of the Resource Management Act 1991

AND

IN THE MATTER

of the Proposed Canterbury Land and Water
Regional Plan

MEMORANDUM OF COUNSEL ON BEHALF OF GENESIS ENERGY



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I. INTRODUCTION

1. This memorandum addresses a question raised during the hearing in relation to the appropriateness of water activities having controlled activity status in the proposed regional plan.¹
2. The discussion included the following considerations:
 - (a) Water take consents (unlike land use consents²) do not 'run with the land' in perpetuity.
 - (b) The RMA does not generally provide an assurance that resource consent applications will be granted.
 - (c) A regional council (as the administrator of a regional plan) can only authorise matters to the extent the law allows.
 - (d) The RMA provides a maximum resource consent term of 35 years for water activities with no general assurance that a new consent will be granted after expiry.

STATUTORY CONTEXT

3. Key provisions of the RMA include:

Resource consents - activity status

- (a) Section 87³ sets out the different types of resource consents – distinguishing, for example, between land use consents, water permits, and discharge permits.
- (b) Section 87A⁴ lists the classes of activities and their related resource consent status.

¹ See, for example, the Transcript of questioning of Ms Hamm, Mr Curry and Mr Bryce (14 March 2013) in relation to a regional plan providing controlled activity status for water activities.

² Encompassed by section 9.

³ Section 87 provides:

"87 Types of resource consents

In this Act, the term **resource consent** means any of the following:

- (a) a consent to do something that otherwise would contravene section 9 or section 13 (in this Act called a **land use consent**);
- (b) a consent to do something that otherwise would contravene section 11 (in this Act called a **subdivision consent**);
- (c) a consent to do something in a coastal marine area that otherwise would contravene any of sections 12, 14, 15, 15A, and 15B (in this Act called a **coastal permit**);
- (d) a consent to do something (other than in a coastal marine area) that otherwise would contravene section 14 (in this Act called a **water permit**);
- (e) a consent to do something (other than in a coastal marine area) that otherwise would contravene section 15 (in this Act called a **discharge permit**)."

⁴ Section 87A provides:

"87A Classes of activities

- (1) If an activity is described in this Act, regulations (including any national environmental standard), a plan, or a proposed plan as a permitted activity, a resource consent is not required for the activity if it complies with the requirements, conditions, and permissions, if any, specified in the Act, regulations, plan, or proposed plan.
- (2) If an activity is described in this Act, regulations (including any national environmental standard), a plan, or a proposed plan as a controlled activity, a resource consent is required for the activity and—

Section 87A(2) confirms that where an activity is described in a plan as a controlled activity, a resource consent is required for that activity but the consent authority must grant such consent where any specified requirements are met.⁵ Also, the power to impose conditions is restricted to the matters over which control is reserved in the plan, or other instrument specified in section 87(2)(b).

- (c) The definition of “controlled activity” in section 2 confirms the place of section 87A(2) in the scheme of the RMA.⁶

Consideration of resource consents

- (d) Section 104 lists the relevant considerations for the determination of resource consents.
- (e) Section 104A⁷ sets out additional matters that apply to the consideration of controlled activity resource consent applications.

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- (a) the consent authority must grant a resource consent except if—
- (i) section 106 applies; or
 - (ii) section 55(2) of the Marine and Coastal Area (Takutai Moana) Act 2011 applies; and
- (b) the consent authority's power to impose conditions on the resource consent is restricted to the matters over which control is reserved (whether in its plan or proposed plan, a national environmental standard, or otherwise); and
- (c) the activity must comply with the requirements, conditions, and permissions, if any, specified in the Act, regulations, plan, or proposed plan.
- (3) If an activity is described in this Act, regulations (including any national environmental standard), a plan, or a proposed plan as a restricted discretionary activity, a resource consent is required for the activity and—
- (a) the consent authority's power to decline a consent, or to grant a consent and to impose conditions on the consent, is restricted to the matters over which discretion is restricted (whether in its plan or proposed plan, a national environmental standard, or otherwise); and
 - (b) if granted, the activity must comply with the requirements, conditions, and permissions, if any, specified in the Act, regulations, plan, or proposed plan.
- (4) If an activity is described in this Act, regulations (including any national environmental standard), a plan, or a proposed plan as a discretionary activity, a resource consent is required for the activity and—
- (a) the consent authority may decline the consent or grant the consent with or without conditions; and
 - (b) if granted, the activity must comply with the requirements, conditions, and permissions, if any, specified in the Act, regulations, plan, or proposed plan.
- (5) If an activity is described in this Act, regulations (including a national environmental standard), a plan, or a proposed plan as a non-complying activity, a resource consent is required for the activity and the consent authority may—
- (a) decline the consent; or
 - (b) grant the consent, with or without conditions, but only if the consent authority is satisfied that the requirements of section 104D are met and the activity must comply with the requirements, conditions, and permissions, if any, specified in the Act, regulations, plan, or proposed plan.
- (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.
- (7) However, subsection (6) does not apply to a concurrent application lodged under subpart 4 of Part 7A.”

⁵ Except where section 106 (subdivision consents) or section 55(2) of the Marine and Coastal Area (Takutai Moana) Act apply.

⁶ Section 2(1) provides:

“Interpretation

2 (1) In this Act, unless the context otherwise requires, -

...

controlled activity means an activity described in section 87A(2)”

⁷ Section 104A provides:

Regional rules

- (f) Section 68⁸ outlines rules that may be included in a regional plan.

“104A Determination of applications for controlled activities

After considering an application for a resource consent for a controlled activity, a consent authority—

- (a) must grant the resource consent, unless it has insufficient information to determine whether or not the activity is a controlled activity; and
- (b) may impose conditions on the consent under section 108 only for those matters—
 - (i) over which control is reserved in national environmental standards or other regulations; or
 - (ii) over which it has reserved its control in its plan or proposed plan”

⁸ Section 68 provides:

“68 Regional rules

- (1) A regional council may, for the purpose of—
 - (a) carrying out its functions under this Act (other than those described in paragraphs (a) and (b) of section 30(1)); and
 - (b) achieving the objectives and policies of the plan,—
 include rules in a regional plan.
- (2) Every such rule shall have the force and effect of a regulation in force under this Act but, to the extent that any such rule is inconsistent with any such regulation, the regulation shall prevail.
- (2A) Rules may be made under this section for the protection of other property (as defined in section 7 of the Building Act 2004) from the effects of surface water, which require persons undertaking building work to achieve performance criteria additional to, or more restrictive than, those specified in the building code as defined in section 7 of the Building Act 2004.
- (3) In making a rule, the regional council shall have regard to the actual or potential effect on the environment of activities, including, in particular, any adverse effect.
- (4) A rule may specify an activity as a restricted coastal activity only if the rule is in a regional coastal plan and the Minister of Conservation has required the activity to be so specified on the grounds that the activity—
 - (a) has or is likely to have significant or irreversible adverse effects on a coastal marine area; or
 - (b) occurs or is likely to occur in an area having significant conservation value.
- (5) A rule may—
 - (a) apply throughout the region or a part of the region;
 - (b) make different provision for—
 - (i) different parts of the region; or
 - (ii) different classes of effects arising from an activity;
 - (c) apply all the time or for stated periods or seasons;
 - (d) be specific or general in its application;
 - (e) require a resource consent to be obtained for an activity causing, or likely to cause, adverse effects not covered by the plan.
- (7) Where a regional plan includes a rule relating to 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, the plan may state—
 - (a) whether the rule shall affect, under section 130, the exercise of existing resource consents for activities which contravene the rule; and
 - (b) that the holders of resource consents may comply with the terms of the rule, or rules, in stages or over specified periods.
- (8) Where regulations have been made under section 360(1)(ha) deeming rules to be included in a regional coastal plan or proposed regional coastal plan, the relevant regional council shall, as soon as reasonably practicable after the date on which the regulations are made, revoked, or cease to apply to its region,—
 - (a) give public notice of the fact that such regulations have been made or revoked or have ceased to apply, as the case may be, and in such detail as the council considers appropriate, generally describe the nature of any rules deemed to be included in the plan or proposed plan by those regulations; and
 - (b) ensure that a copy of any regulations deeming rules to be included in the plan or proposed plan is annexed to, and appropriate annotations are made in, every copy of that plan or proposed plan that is under the regional council's control.

- (g) Section 68(5) provides that a rule may:
- (i) apply throughout the region or a part of the region;
 - (ii) make different provision for different parts of the region or different classes of effects arising from an activity;
 - (iii) apply all the time or for stated periods or seasons;
 - (iv) be specific or general in its application;
 - (v) require a resource consent to be obtained for an activity causing, or likely to cause, adverse effects not covered by the plan.

Wider context

- (h) Other than land-use or subdivision consents for activities encompassed by sections 9 or 11 respectively, resource consents have a maximum duration of 35 years.⁹

POWER TO PROVIDE CONTROLLED ACTIVITY STATUS

4. The RMA expressly empowers activities to have controlled activity status and includes a statutory scheme for the consideration of resource consent applications for such activities.
5. There is no express statutory exclusion on water activities having controlled activity status. This is to be contrasted with section 68(9) which expressly states that no rule can authorise as a permitted activity particular types of coastal activities.
6. Nor, does the 35 year maximum consent term act as a statutory bar to water permits having controlled activity status. Consent authorities have jurisdiction to specify consent terms in any controlled activity consents under section 123(d). As with other classes of activities requiring resource consents, there is no right of consent renewal. But, that is not antithetical to water permits having controlled activity status.

RELIABILITY OF PRECEDENTS

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- (9) Notwithstanding anything to the contrary in this section, no rule of a regional coastal plan shall authorise as a permitted activity any of the following activities to which section 15A applies:
- (a) the dumping in the coastal marine area of any waste or other matter from any ship, aircraft, or offshore installation;
 - (b) the dumping in the coastal marine area of any ship, aircraft, or offshore installation;
 - (c) the incineration in the coastal marine area of any waste or other matter in any marine incineration facility.
- (10) Subject to subsection (9), sections 69 and 70(2) shall, with all necessary modifications, apply to the inclusion of rules in regional coastal plans about the dumping of waste or other matter as if every reference in those provisions to a discharge of a contaminant included a reference to a dumping of waste or other matter.
- (11) A rule may exempt from its coverage an area or class of contaminated land if the rule—
- (a) provides how the significant adverse effects on the environment that the hazardous substance has are to be remedied or mitigated; or
 - (b) provides how the significant adverse effects on the environment that the hazardous substance is reasonably likely to have are to be avoided; or
 - (c) treats the land as not contaminated for purposes stated in the rule."

⁹ Section 123.

7. A question arose as to the reliability of precedents which have provided for controlled activity status for water activities in other regional plans.
8. Variation 6 to a proposed change to the Waikato Regional Plan was the subject of an Environment Court hearing and decision which provided, for example, controlled activity status for the re-consenting of the Huntly Power Station water take permits.
9. The controlled activity status in that case was accepted by all parties and therefore not the subject of argument on the vires of a controlled activity status. For completeness, it is noted that no party, all of whom were represented by experienced counsel and planners, nor the Environment Court challenged the vires of that rule.



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