DOUBLE SIDED ORIGINAL

Decision No. A061/2001

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of an appeal under section 120 of the Act

BETWEEN **PVL PROTEINS LIMITED and another**

(RMA 1156/99)

Appellant

AND **THE AUCKLAND REGIONAL COUNCIL**

Respondent

BEFORE THE ENVIRONMENT COURT

Environment Judge D F G Sheppard (presiding)
Environment Commissioner I G C Kerr
Environment Commissioner J Kearney

HEARING at **AUCKLAND** on 26 and 27 March 2001

COUNSEL

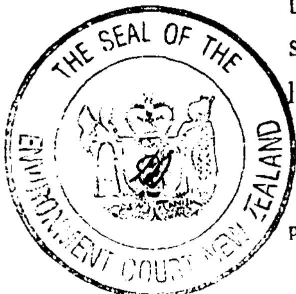
D A Kirkpatrick and W Embling for the appellant
B I J Cowper and S Pond for the respondent

DECISION

Introduction

[1] The appellants, PVL Proteins Limited and Auckland Meat Processors Limited, had applied to the Auckland Regional Council for resource consent to discharge contaminants to air from the operation of a slaughterhouse, rendering plant, hot water and steam raising plant, and associated processes at premises at 851 Great South Road, Otahuhu.

[2] Consent was granted by the Regional Council on 5 August 1998, subject to standard and special conditions, for a term to expire on 31 July 2008. The appellants lodged an objection against the term of the consent, seeking a term of 35 years



instead. Following a hearing, by decision given on 29 October 1999 the objection was disallowed.

[3] By this appeal, the appellants again sought that the consent be amended to provide a term of 35 years. That was resisted by the Regional Council.

[4] As the term of the consent is the only issue in the appeal, we will consider the relevant provisions of the Act and the decisions that might bear on their application, to derive from them a basis for deciding the issue. We could then deal with the arguments based on the circumstances of the case.

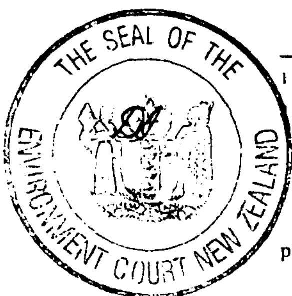
Provisions of the Resource Management Act

[5] First there is the stated purpose of the Act–

> *5. **Purpose**– (1) The purpose of this Act is to promote the sustainable management of natural and physical resources.*
> *(2) In this Act, "sustainable management" means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety while–*
> *(a) Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and*
> *(b) Safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and*
> *(c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment.*

[6] An application for a resource consent to discharge contaminants to air, like all resource consent applications, is required to include an assessment of any actual or potential effects that the activity may have on the environment, and the ways in which any adverse effects may be mitigated.[1] The assessment is to be in such detail as corresponds with the scale and significance of the actual and potential effects that the activity may have on the environment.[2]

[7] In considering a resource consent application, a consent authority is required to have regard to any actual or potential effects on the environment of allowing the activity, to any relevant regional policy statement, and any relevant objectives,



[1] Resource Management Act 1991, s 88(4)(b).
[2] Resource Management Act 1991, s 88(6)(a).

policies, rules or other provisions of a plan or proposed plan.[3] There is specific provision in section 104(3) in respect of applications for discharge permits[4]–

> *(3) Where an application is for a discharge permit or coastal permit to do something that would otherwise contravene section 15 or 15B (relating to discharge of contaminants), the consent authority shall, in having regard to the actual and potential effects on the environment of allowing the activity, have regard to –*
> *(a) The nature of the discharge and the sensitivity of the proposed receiving environment to adverse effects and the applicant's reasons for making the proposed choice; and*
> *(b) Any possible alternative methods of discharge, including discharge into any other receiving environment.*

[8] A consent authority has a discretion conferred by section 105(1) to grant or refuse a resource consent for a discharge of contaminants to air, having regard to the relevant matters referred to in section 104. If consent is granted, the consent authority has power to impose conditions. The term 'conditions' is given a broad meaning[5]–

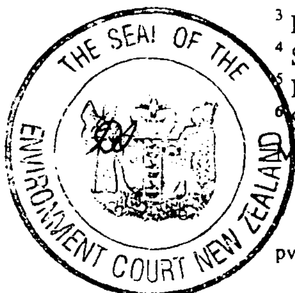
> *"Conditions", in relation to plans and resource consents, includes terms, standards, restrictions and prohibitions:*

[9] The imposition of conditions on resource consents is governed by section 108, of which we quote relevant content[6]–

> ***108. Conditions of resource consents–** (1) Except as expressly provided in this section and subject to any regulations, a resource consent may be granted on any condition that the consent authority considers appropriate, including any condition of a kind referred to in subsection (2).*
> *(2) A resource consent may include any one or more of the following conditions:*
> ...
> *(e) Subject to subsection (8), in respect of a discharge permit or a coastal permit to do something that would otherwise contravene section 15 (relating to the discharge of contaminants) or section 15B, a condition requiring the holder to adopt the best practicable option to prevent or minimise any actual or likely adverse effect on the environment of the discharge and other discharges (if any) made by the person from the same site or source:*
> ...
> *(3) A consent authority may include as a condition of a resource consent a requirement that the holder of a resource consent supply to the consent authority information relating to the exercise of the resource consent.*
> *(4) Without limiting subsection (3), a condition made under that subsection may require the holder of the resource consent to do one or more of the following:*
> *(a) To make and record measurements:*
> *(b) To take and supply samples:*

---

[3] Resource Management Act 1991, s 104(1).
[4] S 104(3) as amended by s 21(1) Resource Management Amendment Act 1997.
[5] Definition of 'conditions' in s 2(1).
[6] S 108 as amended by s 58(6) Resource Management Amendment Act 1993 and by s 24 the Resource Management Amendment Act 1997.



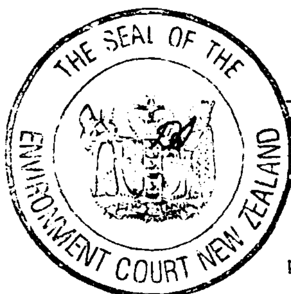
(c) To carry out analyses, surveys, investigations, inspections, or other specified tests:
(d) To carry out measurements, samples, analyses, surveys, investigations, inspections, or other specified tests in a specified manner:
(e) To provide information to the consent authority at a specified time or times:
(f) To provide information to the consent authority in a specified manner:
(g) To comply with the condition at the holder of the resource consent's expense.
....
(8) Before deciding to grant a discharge permit or a coastal permit to do something that would otherwise contravene section 15 (relating to the discharge of contaminants) or 15B subject to a condition described in subsection (2)(e), the consent authority shall be satisfied that, in the particular circumstances and having regard to -
(a) The nature of the discharge and the receiving environment; and
(b) Other alternatives, including any condition requiring the observance of minimum standards of quality of the receiving environment -
the inclusion of that condition is the most efficient and effective means of preventing or minimising any actual or likely adverse effect on the environment.
...

[10] Section 123 does bear on the terms of resource consents. We quote it in full–

***123. Duration of consent–** Except as provided in section 125,—*
(a) The period for which a coastal permit for a reclamation, or a land use consent in respect of a reclamation that would otherwise contravene section 13, is granted is unlimited, unless otherwise specified in the consent:
(b) Subject to paragraph (c), the period for which any other land use consent, or a subdivision consent, is granted is unlimited, unless otherwise specified in the consent:
(c) The period for which any other coastal permit, or any other land use consent to do something that would otherwise contravene section 13, is granted is such period, not exceeding 35 years, as is specified in the consent and if no such period is specified, is 5 years from the date of commencement of the consent under section 116:
(d) The period for which any other resource consent is granted is the period (not exceeding 35 years from the date of granting) specified in the consent and, if no such period is specified, is 5 years from the date of commencement of the consent under section 116.

[11] We were also referred to the power of a consent authority to review conditions of a resource consent. That power is conferred by section 128[7]–

***128. Circumstances when consent conditions can be reviewed–** (1) A consent authority may, in accordance with section 129, serve notice on a consent holder of its intention to review the conditions of a resource consent–*
(a) At any time or times specified for that purpose in the consent for any of the following purposes:
(i) To deal with any adverse effect on the environment which may arise from the exercise of the consent and which it is appropriate to deal with at a later stage; or
(ii) To require a holder of a discharge permit or a coastal permit to do something that would otherwise contravene section 15 or 15B to adopt the best practicable option to remove or reduce any adverse effect on the environment; or



[7] As amended by s 73 the Resource Management Amendment Act 1993, and by s 30 the Resource Management Amendment Act 1997.

(iii) For any other purpose specified in the consent; or

(b) In the case of a water, coastal, or discharge permit, when a regional plan has been made operative which sets rules relating to a 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, and in the regional council's opinion it is appropriate to review the conditions of the permit in order to enable the levels, flows, rates, or standards set by the rule to be met; or

(c) If the information made available to the consent authority by the applicant for the consent for the purposes of the application contained inaccuracies which materially influenced the decision made on the application and the effects of the exercise of the consent are such that it is necessary to apply more appropriate conditions.

...

[12] The exercise of the power of review is governed by section 131[8]–

131. Matters to be considered in review– *(1) When reviewing the conditions of a resource consent, the consent authority or hearing committee set up under section 117 in respect of a permit for a restricted coastal activity–*

(a) Shall have regard to the matters in section 104 and to whether the activity allowed by the consent will continue to be viable after the change; and

(b) May have regard to the manner in which the consent has been used.

(2) Before changing the conditions of a discharge permit or a coastal permit to do something that would otherwise contravene section 15 (relating to the discharge of contaminants) or 15B to include a condition requiring the holder to adopt the best practicable option to remove or reduce any adverse effect on the environment, the consent authority shall be satisfied, in the particular circumstances and having regard to–

(a) The nature of the discharge and the receiving environment; and

(b) The financial implications for the applicant of including that condition; and

(c) Other alternatives, including a condition requiring the observance of minimum standards of quality of the receiving environment–

that including that condition is the most efficient and effective means of removing or reducing that adverse effect.

Decisions about terms of consent

[13] We have identified the provisions of the Act that might be relevant. We were not referred to any decision of a superior Court on the interpretation or application of those provisions with reference to the term of a resource consent, and we are not aware of any. We now consider decisions of the Planning Tribunal and the Environment Court about the terms of resource consents.

[8] As amended by s 31 the Resource Management Amendment Act 1997.

[14] In *Medical Officer of Health v Canterbury Regional Council*[9] the Planning Tribunal considered the term of a grant of a resource consent for discharge to air of contaminants from an existing fertiliser works, the appellant contending that it should be restricted to a period of five years. The Tribunal referred to the Regional Council's power of review, and to section 108(8). Of the appellant's proposal that the term be limited to five years, the Tribunal said that the provision allowing for annual reviews by the Council[10]–

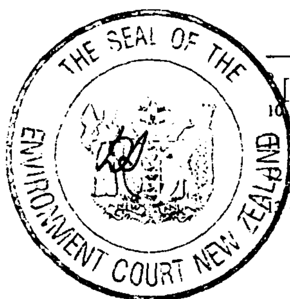
> *... is a very much tighter supervision of the operation by the applicant of the resource consent than the proposal made by him that the term of the grant be for only five years.*

[15] And of the provisions for review of conditions[11]–

> *... is in our view a mechanism by which a consent authority can ensure that conditions imposed on a resource consent do not become outdated, irrelevant or inadequate.*
>
> ...
>
> *... Indeed they provide a more rigorous and effective mechanism for ensuring that the applicant company does not adversely affect the air quality of the area surrounding its factory and provides a more efficacious procedure than the somewhat blunt instrument suggested by the Medical Officer of Health, that the term of this resource consent be limited to five years to enable these matters to be looked at afresh after that time. We can see no grounds for the appellant's pessimism concerning the integrity of this process. We must, and do assume that the regional council will do its duty according to law in enforcing and monitoring these discharges.*

[16] *Mangakahia Maori Komiti v Northland Regional Council*[12] concerned contested applications for resource consent to abstract water from a river. One member of the Tribunal was satisfied that a ten-year term could be granted, and the majority preferred a six-year term, with the possibility of a review of conditions after three years. The reasoning is expressed in these passages from the decision[13]–

> *The majority are satisfied that for the proposed 6-year period of the present grants of consent the nature and quality of the river will be duly and properly maintained and safeguarded; further, that by granting consent for such period on the conditions imposed, due recognition and provision will be made for all relevant paragraphs of s 6; that particular regard will be had to the various paragraphs of s 7; and that the principles prima facie the Treaty will be appropriately taken into account. In particular, they are satisfied that the river, as a fishing resource, will not be adversely affected in any significant way. Unlike Mr Fitzmaurice [the dissenting Commissioner] however, they are not utterly confident in the view that*



[9] [1995] NZRMA 49.
[10] Pg 56.
[11] Pg 63.
[12] Planning Tribunal Decision A107/95.
[13] Pg 47.

all this would be the case if the consent period were of the order or ten years. The case is one, in their opinion, where a "fresh look" is warranted rather sooner, remembering always the river's central importance and status in the eyes of the tangata whenua and weighing all the experts' opinions against the background of present day data and other information.

[17] In *Hebberd v Marlborough District Council*[14] the Planning Tribunal considered the term of a resource consent for a marine farm[15]–

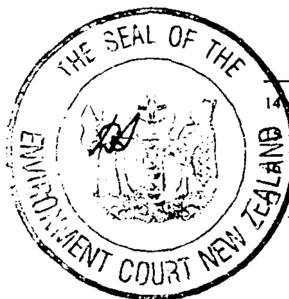
> *We consider the Council is wise to be cautious in its approach to the long term effects of the grant of marine farm licences. The Council's evidence indicated that of the approximately 500 marine farms in the Marlborough Sounds, 9 are in this particular bay. As Mr Dwyer submitted the protection of amenity values in the Sounds has considerable economic potential in itself as a basis for substantial tourist, holiday maker and permanent resident population. Most of the marine farms in this area were licensed under previous legislation. Mr Wagg told us that farming as such had ceased in the Bay, and land use was tending to recreational forest development through planting and regeneration of native bush. He believed further subdivision of present holdings was possible with further housing; and that occupation in the Bay may intensify. It is in an "Area of Outstanding Landscape Value". We are therefore mindful that use of this Bay may ... change within the planning period.*
>
> ...
>
> *Under the circumstances we will remain consistent with our approach on other provisions of the proposed Plan, and grant a term of 20 years in keeping with the provisions as they currently stand.*

[11] *Prime Range Meats v Southland Regional Council*[16] concerned the term of consent to discharge to air of contaminants from an existing meatworks. Consent had been granted by the Regional Council for a term of five years, and the appellant sought a term of ten years. Condition 4 stipulated–

> *[a] There shall be no odour of a noxious, offensive or objectionable nature, or any nuisance effect, beyond the boundary of the site attributable to gaseous emissions further the consent holder's premises.*

[12] The consent also contained a condition providing for review, of which the Court said[17]–

> *We have difficulty in accepting that review under section 128 would be an adequate solution for a number of reasons. First review is triggered by the Regional Council as consent authority and so the residents who would be affected may not feel that the solution is in their control. Secondly and more importantly there would be a tendency to approach the problem (non-compliance with condition 4) on the basis that the answer is to put up a condition with which it is easier for PRM [the applicant] to comply while not necessarily improving the amenities for residential neighbours. We cannot see that leaving the smell issue to be dealt with by*



[14] Planning Tribunal Decision W36/96.
[15] Pg 9.
[16] Environment Court Decision C127/98.
[17] Paragraph 17.

reviewing condition 4 "at a later stage" is appropriate at all. Both sides would be back to square one at that stage.
We do not overlook that the Regional Council has specific power in relation to a discharge permit on a review to require PRM to "reduce any adverse effect on the environment". However that has less ameliorating power than a fresh application which <u>may</u> be declined. A discharge permit that expires in five years would concentrate PRM's corporate mind.
...

[18] The Court listed the matters that it took into account as being–

> *(a) the past record of PRM and its predecessors;*
> *(b) the concern of the residents that they will have to put up with a nuisance for ten years rather than five. In other words there was scepticism that condition 4 would be met.*
> *(c) the relatively low capital expenditure by PRM as opposed to the expenditure on repairs and maintenance or for profit.*
> *(d) the uncertainty of condition 4.*
> *(e that technological advances may lead to more definite ways of measuring and/or reducing odours.*

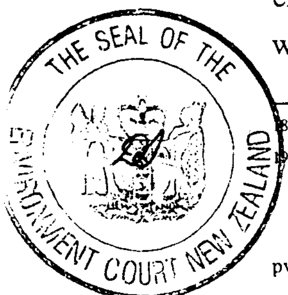
[19] The Court's conclusion is stated in this passage[18]–

> *... the one aspect of the case that concerns us more than any other is the uncertainty of the Regional Council's conditions 4. We consider that outweighs the uncertainty of PRM only having a discharge permit for five years. At that stage – if the company has continued to repair and maintain, completed and operated the new anaerobic pond and completed the hookup of various sources of odour to the biofilter – we trust that either new technology allowing objective measurement of odour or some more thought about the appropriate condition to replace condition 4 will enable a more satisfactory solution than the existing condition. Accordingly it appears to us that the most appropriate solution is to confirm the Regional Council decision as to term of the consent being restricted to five years.*

[20] In *Bright Wood v Southland Regional Council*[19] the issue was the terms of resource consents for discharge of contaminants to air from a timber processing operation, and for discharge of treated stormwater from that operation into a river. Both consents had been granted for 15 years and the appellant sought 25 years.

[21] The consents contained review conditions, although the Court was critical of the way in which those conditions were expressed.

[22] The Court distinguished *Prime Range Meats*, as being a case in which there had been considerably more public disquiet over operation of the factory. It expressed a concern about toxic metals being flushed into the river and finding their way into the surrounding environment, and considered that in 15 years that issue



[18] Paragraph 21.
[19] Environment Court Decision C143/99.

should be revisited, as techniques might have been developed by then which would enable complete containment of those pollutants.

[23] The Court concluded that it would be appropriate to give different terms for the two resource consents: 25 years for the discharge to air, and 15 years for the discharge to water. Of the discharge to air, the Court said[20]–

> *If there are adverse effects from that discharge the review conditions should, as Mr Chapman submitted, be adequate to avoid or remedy them. To protect its investments on the site, Bright Wood is entitled to as much security of term as is consistent with sustainable management.*

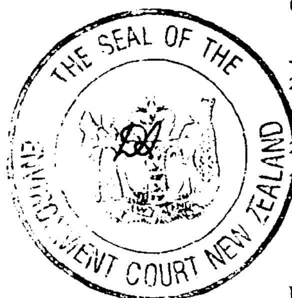
[24] Finally, we were referred to *Aviation Activites v MacKenzie District Council*[21] concerning a tourist helicopter operation. The Court found that the risks of accident were very slight, and noise effects would be minor, but limited the consent to 10 years so that in future the appropriateness of the site could be determined in the light of development of Tekapo at that time. The Court's reasoning is stated in this passage from the decision[22]–

> *A method which we think can usefully and fairly be employed here to encourage helicopter activities to establish (ultimately) at the Tekapo Airport would be to grant a resource consent that is limited in duration. Normally granting a land use consent that is so limited may constrain investment on the land. However, here there is v little development (no building) on the site, so a 10 year consent period may still prove useful for AA [the applicant]. Limiting the resource consent in that way would enable a termination of the resource consent if circumstances changed. For example, if the township develops towards the site, then there will be an opportunity for new residents to oppose any new resource consent when this one expires (if granted).*

Basis for deciding terms of consent

[25] We draw from the provisions of the Act the indications about the terms of resource consents for discharges of contaminants to air set out in paragraphs [28] to [30].

[26] The consent authority has power to grant such a resource consent for any term not exceeding 35 years from the date of granting that it considers appropriate, but if no term is specified, the term of the resource consent is 5 years from commencement.[23]



[20] Paragraph 10.
[21] Environment Court Decision C72/2000.
[22] Paragraph 51
[23] Resource Management Act 1991, s 123(d).

[27] A decision on what is the appropriate term of the resource consent is to be made for the purpose of the Act,[24] having regard to the actual and potential effects on the environment and relevant provisions of applicable instruments under the Act,[25] the nature of the discharge, the sensitivity of the receiving environment to adverse effects, the applicant's reasons, and any possible alternative methods of discharge, including to another receiving environment.[26]

[28] Relevant factors in making a decision on the term of the resource consent include that conditions may be imposed requiring adoption of the best practicable option,[27] requiring supply of information relating to the exercise of the consent,[28] requiring observance of minimum standards of quality in the receiving environment,[29] and reserving power to review the conditions.[30]

[29] We also draw from the decisions reviewed the indications about the terms of resource consents for discharges of contaminants to air summarised in paragraphs [30] and [31].

[30] Uncertainty for an applicant of a short term, and an applicant's need (to protect investment) for as much security as is consistent with sustainable management, indicate a longer term.[31] Likewise, review of conditions may be more effective than a shorter term to ensure conditions do not become outdated, irrelevant or inadequate.[32]

[31] By comparison, expected future change in the vicinity has been regarded as indicating a shorter term.[33] Another indication of a shorter term is uncertainty about the effectiveness of conditions to protect the environment (including where the applicant's past record of being unresponsive to effects on the environment and making relatively low capital expenditure on alleviation of environmental effects

[24] Ibid, s 5.
[25] Ibid, s 104(1).
[26] Ibid, s 104(3).
[27] Ibid, s 108(2)(e).
[28] Ibid, s 108(3) and (4).
[29] Ibid, s 108(8).
[30] Ibid, s 128(1).
[31] *Prime Range Meats v Southland Regional Council* C127/98; *Bright Wood v Southland Regional Council* C 143/99.
[32] *Medical Officer of Health v Canterbury Regional Council* [1995] NZRMA 49.
[33] *Hebberd v Marlborough District Council* W36/96; *Aviation Activities v Macakenzie District Council* W72/2000.

compared with expenditure on repairs and maintenance or for profit).[34] In addition, where the operation has given rise to considerable public disquiet, review of conditions may not be adequate, as it cannot be initiated by affected residents.[35]

[32] The Regional Council submitted that an activity that generates known and minor effects on the environment on a constant basis could generally be granted consent for a longer term, but that one which generates fluctuating or variable effects, or which depends on human intervention or management for maintaining satisfactory performance, or relies on standards that have altered in the past and may be expected to change again in future should generally be granted for a shorter term. We accept that in general those propositions might influence decisions on the term of discharge consents.

[33] On review conditions, the Regional Council submitted that they may be used in conjunction with longer terms where review is capable of addressing all issues of concern, but not where a consent-holder's financial viability might constrain controls intended to avoid, remedy or mitigate significant adverse effects on the environment.

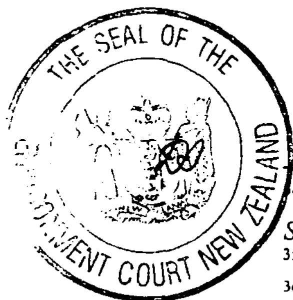
[34] We accept that. It emphasises the value of careful identification of risk, and selection of a safeguard that is tailored to respond to the nature of the risk identified.

The case in question

[35] We have identified what we understand to be the relevant statutory provisions and the factors that have been adopted in previous decisions in respect of the term of discharge permits. Now we outline the circumstances of the case before us.

[36] The Auckland regional policy statement contains a policy that adequate separation distances are to be maintained between industrial premises that have potential to discharge noxious, offensive or objectionable contaminants to air and adjacent land uses.[36] The explanation of the policy states–

> *Good pollution control and sound practice is not an adequate substitute for buffer distances to segregate noxious and offensive industry from other sensitive land uses.*



[34] *Mangakahia Maori Komiti v Northland Regional Council* A107/95; *Prime Range Meats v Southland Regional Council* C127/98.
[35] *Prime Range Meats v Southland Regional Council* C127/98.
[36] Policy 10.4.7.4.

[37] Ms J L Metcalfe, a Regional Council senior air quality officer, gave the opinion that if the surrounding land use does become more sensitive, it is likely that the buffer distance between the plant and surrounding land uses will not be adequate to prevent adverse effects.

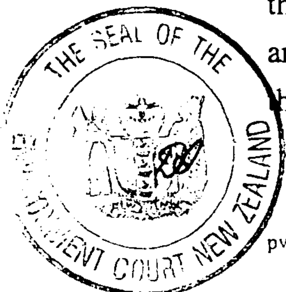
[38] Under the Auckland City Council's district plan, the appellants' plants are located in a Business 5 zone, and are permitted activities in that zone. The site is bounded to the west by the Otahuhu railway marshalling yards and to the south by Portage Road. Great South Road runs alongside fields on the eastern boundary, beyond which is the Mount Richmond Domain and land zoned Business 4. The property to the north (zoned Business 5) is used for freight marshalling. The rendering plant is 60 metres from its nearest boundary, and the nearest downwind neighbour is over 700 metres distant. The nearest neighbour is 150 metres from the plant, and the nearest residential properties are about 300 metres to the east of the site.

[39] The Business 4 zone is intended for a wide range of medium intensity business activity, mainly office, service and light industry. 'Heavy' and 'noxious' industries are discouraged. Activities that are permitted include care centres, educational facilities, entertainment facilities, garden centres and retail facilities.

[40] The Business 5 zone is intended for activities that are unable to locate in mixed business zones because of amenity constraints. It is a zone in which amenity levels such as noise, dust and odour will be considerably lower than in the Business 1 to 4 zones. Sensitive land uses are discretionary there. It is an appropriate zone for the appellants' activities.

[41] Ms Metcalfe's opinion about the buffer appears to question the appropriateness of the Business 5 zoning of the site in juxtaposition with the Business 4 zoning of land to the east of Great South Road. It is our understanding that the zoning of those pieces of land in the district plan are now beyond challenge in this Court, and that this appeal about the term of the discharge permit does not provide an opportunity to review that zoning.

[42] Mr A von Tunzelman, General Manager of PVL Proteins Limited, explained that Auckland Meat Processors Limited slaughters and processes cattle, sheep, pigs and goats for consumption on the domestic market. He testified that about 90% of the meat consumed in Auckland, and in excess of 75% of all North Island domestic



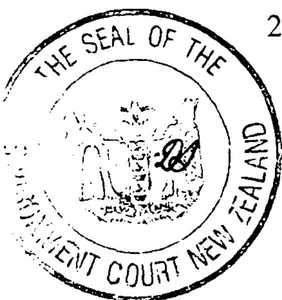
meat is supplied from this site. The other appellant, PVL Proteins Limited, recycles animal byproducts (largely from the abattoir) into meat and bone meal, tallow and dried blood for local and export markets.

[43] Mr von Tunzelman deposed that since it purchased the operation in 1993, PVL Proteins Limited had at its own initiative carried out significant environmental improvements to the plant at a cost of $2.5 million. It had also made improvements in the environmental procedures at the plant, and had obtained ISO 9002 and ISO 14001 accreditation for its operation, which provides additional assurance, through 6-monthly audits, that its environmental obligations are being met.

[44] The witness also testified that there had been a small number of complaints about the activity, and that all had been responded to by alterations to systems and procedures. Plant breakdowns had been eliminated by duplication of machinery and constant availability on site of tradesmen and spare parts. For the present application the appellants had obtained the consents of all persons considered by the Regional Council as potentially affected, and as a result the application had been processed without public notification.

[45] Ms Metcalfe deposed that since 1991 the Council had received 40 complaints relating to odour from the site, nine in 2000. However she acknowledged that the company has consistently improved odour control over the past ten years. Ms Metcalfe testified that Regional Council enforcement officers had detected odour from beyond the boundary of the site on six occasions in 2000, and that the odour was considered to be offensive and objectionable on three of those occasions. Those emissions were attributed to fumes escaping when a door is opened, and to storage of effluent at the abattoir. In cross-examination she agreed that the plants had a "good track record".

[46] Mr von Tunzelman observed that the cost of the high expense on environmental protection placed PVL Proteins at a disadvantage in relation to other rendering plants the operators of which had been required to spend little or nothing on environmental improvements, yet had been granted considerably longer terms of consent. He named two rendering plants that had been granted consents for 20 and 25 years respectively.



[47] The witness testified that the applicants wish in future to replace much of the existing plant in a new building specifically designed to meet existing and future needs, using knowledge gained in the past years, but required the security of a longer term than 10 years to warrant the expenditure.

[48] In cross-examination, Mr von Tunzelman agreed that the most significant improvements to the plant had been made while the company had resource consent for only 5 years. However he confirmed that if the consent for the plant had a longer term, the directors would be keen to rebuild the "envelope", though he acknowledged that there is no firm commitment to rebuilding.

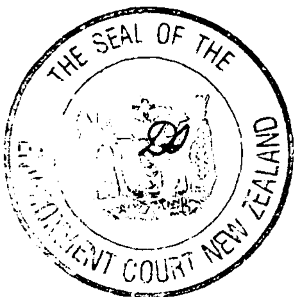
[49] The witness also agreed that the smell from the rendering plant could be offensive if it escaped; and that the performance of staff is critical.

[50] The appellants also called Dr T J Brady, a consultant chemist specialising in air pollution control, with considerable experience of abattoirs and rendering plants. He produced a substantial report of his assessment of discharges to air from the abattoir and rendering plant.

[51] Dr Brady deposed that the best practicable option had been adopted for minimising emissions from the plant by incineration of fumes from cookers and dryers, complete sealing of the processing building, changing the air 20 times per hour and venting through two large biofilters, and duplication of all key pieces of equipment and odour control systems. The witness gave the opinion that there is no engineering reason that the current high level of performance will not continue for the indefinite future, and that it is unlikely that there will be any changes in technology in the foreseeable future that would improve on what is already in place.

[52] Dr Brady also referred to Conditions 3 and 4 of the discharge permit–

> *That beyond the boundary of the site there shall be no odour caused by discharges from the site which, in the opinion of an enforcement officer, is noxious, offensive or objectionable.*
>
> *That the consent holder shall at all times operate, maintain, supervise, monitor and control all processes on site so that emissions authorised by this consent are maintained at the minimum practicable level ...*



[53] In cross-examination, Dr Brady agreed that the contribution by the staff is an important component, and that with the best technology, the appellants could not prevent odour being discharged accidentally. He deposed that its good performance results from a mixture of technology and management.

[54] Mr K C Mahon, the Regional Council's Air Quality Manager, deposed that the rendering industry is subject to regular change through innovative technological advances, so that the best practicable option changes frequently. He referred to changes over the last decade in process method, in fuel, and in air pollution control technologies.

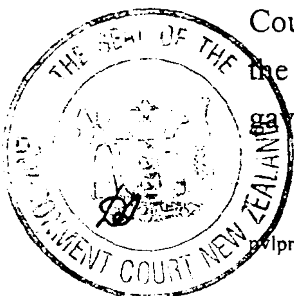
[55] Of PVL Proteins' plant, Mr Mahon testified that it is one of the best controlled rendering operations in New Zealand, but it is still subject to breakdowns, depends on strict management to control fugitive emissions, and is a significant cause of complaint. In cross-examination he agreed that the afterburners are well designed, and that the biofilters are operating successfully with what they are dealing with. He also agreed that duplication of the lines is a significant risk-reduction method.

[56] The discharge permit also contains a review condition, which we quote–

> *That the Group Manager may review the conditions of this consent in December 1998, and every year thereafter in order:*
> *a. to deal with any significant effect on the environment arising from the exercise of this consent which was not foreseen at the time the application was considered and which it is appropriate to deal with at the time of the review.*
> *b. to consider the adequacy of the conditions which prevent nuisance beyond the boundary of the premises, particularly if regular or frequent complaints have been received and validated by an enforcement officer.*
> *c. to consider developments in control technology and management practices that would enable practicable reductions in the discharge of contaminants.*

[57] Mr Mahon testified that the Regional Council almost always imposes review conditions, and also monitoring conditions. He confirmed that PVL Proteins employs an odour monitor, and that the Regional Council has access to the monitor's reports.

[58] Mr Mahon deposed that the ability to review conditions had led the Regional Council to use longer terms. However he acknowledged the important place, under the Resource Management Act, of opportunities for public participation. Mr Mahon gave the opinion that, in cases such as PVL Proteins, where there are potential



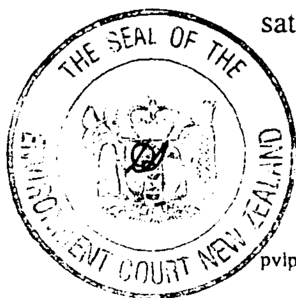
adverse effects, and the neighbourhood could change significantly over 10 years, it would be irresponsible to exclude the public by relying entirely on review provisions. The witness also doubted that it would be practical to deal with PVL Proteins' rendering plant under those provisions, because a consent renewal process would typically involve an independent expert, and requirement for further information, neither of which could be required in a review process.

[59] In cross-examination Mr Mahon explained that he was referring to an independent expert to prepare an assessment of environmental effects to be included with a resource consent application. He confirmed that on a review of conditions the nature of the process would not have changed, and that the Regional Council would have monitoring information and rights of inspection.

[60] Ms Metcalfe cited a number of reasons that caused her to believe that review would not deal with changes in effects or technology. The first was that there is not provision for public input into the initiation of a review (other than informal request). The second was that a review does not generate an assessment of environmental effects. The third was that in proposed changes to conditions the onus of proof is on the consent authority. Fourthly that to initiate a review to address adverse effects, the effects have to be demonstrated by the consent authority, while a consent renewal provides incentive and opportunity for effects to be identified by the applicant at its expense. Fifthly, a review may not result in termination of a consent (except in limited circumstances). The sixth reason was that on review the consent authority has to consider whether the activity would continue to be viable after the change, which impliedly limits the amendment to conditions for protection of the environment.

[61] In cross-examination about the first reason, Ms Metcalfe acknowledged that the review condition expressly requires the official to have regard to complaints, and confirmed that complaints to the Regional Council are formally recorded.

[62] On the second reason, Ms Metcalfe agreed that the conditions of the permit require monitoring and logging of data, and provision of it to the Regional Council. They also permit routine inspection, and forbid changes in process. The witness agreed that commissioning a community survey as part of a review process may satisfy her concern in that respect.



[63] On the third reason, Ms Metcalfe was unable to say that her concern about onus of proof was based on legal advice. On the fourth, she agreed that the monitoring conditions call for monitoring to be carried out at the consent-holder's expense.

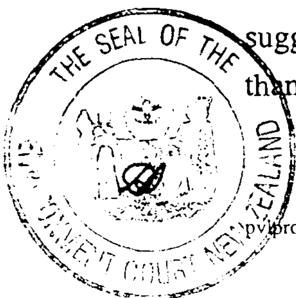
[64] The appellants claimed that a 10-year term, rather than a 35-year term, may result in a significant loss (up to 30%) in the value of the company, and would affect its ability to raise capital in both the equity and the debt markets. They called Mr B V Walsh, a financial consultant, who gave his opinions to that effect.

[65] In cross-examination, Mr Walsh agreed that the loss would be difficult to quantify, and stated that the value of private companies is "very much an art form". He was not aware of the review provisions in the discharge permit, and agreed that a prudent company analyst would take into account the regulatory authority's view of the company's performance.

[66] Mr Mahon deposed that the Regional Council had considered capital investment as one component of its term decision-making for very large investments in the order of hundreds of millions of dollars. Ms Metcalfe gave the opinion that the economic impact on the applicant is not a matter that can sensibly be considered by a consent authority for the purposes of fixing a term of consent. She acknowledged that depreciation of process equipment may be taken into account in setting a consent term for new plants involving considerable capital equipment.

[67] We are not persuaded that a relevant distinction can be made between terms for discharges from existing plant and from new plant; nor between those from plant that involved very large capital investment and those to which less (but still considerable) expenditure was committed. In our opinion in the context of a statutory purpose that includes (among other things) enabling people to provide for their economic well-being, the economic effects on the consent-holder of a particular consent term is a relevant factor, to be considered along with all others.

[68] We accept that a shorter term rather than a longer term might affect to a small degree the value of a company and its ability to raise capital. However we are not persuaded that would-be investors who made diligent enquiries about the circumstances of the appellants would devalue those companies to the extent suggested on account of the term of the air discharge permit being 10 years rather than a longer period that might realistically be expected by them.



Consideration

[69] We now apply to the circumstances of the case the factors that we drew from the Act and the decisions and submissions as relevant considerations for deciding the term of a discharge permit.

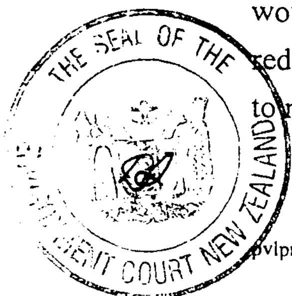
[70] We find that the appellants' plants perform essential functions, are well equipped, and commendably managed. There was no suggestion that they could be operated without any discharge of contaminants to air, or that an alternative method of discharge would be superior. Even so there is some chance of risk of human error allowing escape of objectionable odours. In addition future changes of management might lead to a relaxation of the present standards and practice. There is a risk of potential adverse effects on the environment.

[71] The nature of the potential emissions is that they are likely to be objectionable. However they are also capable of being stopped quite quickly, so they are likely to be transitory.

[72] Of the planning instruments under the Act, the regional policy statement calls for a buffer to segregate noxious and offensive industry from sensitive land uses. The district plan uses zoning as a technique for that purpose. The zoning of the site and other land in the vicinity is now beyond challenge, and the site is appropriately zoned for the appellants' activities. Acknowledging that unpleasant odours can be perceived at some considerable distance in some climatic conditions, the nearest area likely to be affected is a mixed business zone, and the nearest residential property is about 300 metres away.

[73] We find that the plants employ what are currently the best practicable options, and the consent contains conditions requiring no objectionable odour beyond the site, minimum practicable level of emissions, supply of monitoring data on the exercise of the consent, and power to review the conditions. This is not a case where the consent-holders' financial ability might constrain compliance with them.

[74] We accept that the shorter the term, the greater the adverse economic effect on the consent-holders, even though we have not been persuaded that the effect would be as great as the appellants contended. A longer term would encourage the redevelopment of the building envelope for the rendering plant, which has potential to reduce even further the risk of fugitive emissions of objectionable odour.



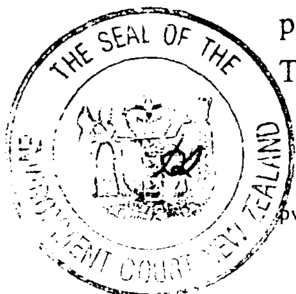
[75] Although predicting the future in a dynamic part of New Zealand cannot be reliable, we have no basis for supposing that there will be significant change in the sensitivity to odour of the kind of activities carried on in the vicinity of the site during the next decade or two. The relevant zoning provisions of the district plan have only recently become operative, and we were not made aware of any economic forces calculated to result in adverse changes.

[76] Nor is there any basis for uncertainty about the effectiveness of the conditions of consent. The appellants have shown, by substantial capital expenditure, a commitment to effects on the environment of odour emissions from their operations, and have been responsive to complaints.

[77] We accept that there is a chance that technological advances may lead to new methods of reducing objectionable discharges in the next decade or so. It is even possible that those advances may reduce further the vulnerability of rendering plants to escape of fugitive emissions due to accident or carelessness. The Regional Council has imposed a review condition, which the appellants have not challenged, that expressly contemplates consideration of amending conditions where developments in control technology and management practices would enable practicable reductions in the discharge of contaminants. We are not persuaded that the chance of such advances warrants a shorter rather than a longer term of the consent, when the consent authority has that power.

[78] The term of a consent, and the ability of a consent authority to review conditions of the consent, provide different safeguards. When the term of a consent expires, the question whether further consent should be granted is open. As the Regional Council pointed out, on an application for a further consent it is for the applicant to provide an assessment of actual or potential effects on the environment, and the ways in which any adverse effects may be mitigated. The application may be publicly notified, and if it is, members of the public may make submissions and be heard and give evidence on the application. The application may be granted or refused, and if it is granted, an entirely fresh set of conditions may be imposed if the consent authority considers appropriate.

[79] By comparison, exercise of a consent authority's power to review is limited to the circumstances described in section 128(1) and in the review condition. Public participation is not assured, but would be at the choice of the consent authority. There is no legal requirement that the consent-holder provide a fresh assessment of

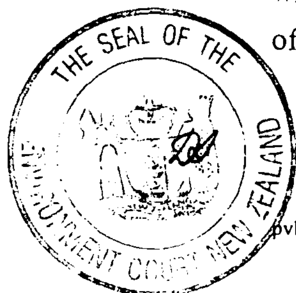


environmental effects or mitigation measures. The consent itself could not be terminated, and in changing the conditions the consent authority would have to have regard to whether the consent would continue to be viable after the change.

[80] In our experience, most of those points of difference are diminished in practice. A consent authority may well decide to exercise a power of review in response to complaints from the public of adverse effects from exercise of the consent. Its need to establish the existence of conditions in which the power of review may be exercised is part of its responsibilities as the regulatory authority, responsibilities that it cannot impose on the consent-holder. However, although not legally obliged to, to protect its interests a consent-holder is in practice likely to respond with an independent review of effects and mitigation measures. While the consent authority is required to have regard to continued viability of the consent after the conditions are changed, there is no other limit on the extent to which the conditions may be changed, save the consent authority's judgement of what is appropriate.

[81] On a fresh application following expiry of a consent, the consent authority may decide that the application does not need to be publicly notified. It is more likely to come to that conclusion if there is no history of public complaints about adverse environmental effects from exercise of the previous consent. In those circumstances too, the extent of an assessment of environmental effects and mitigation measures may be less detailed, corresponding to the scale and significance of the environmental effects. Although the consent authority may not be expressly required to have regard to the continued viability of the activity for which the consent is required, in practice the positive effects of a further grant, and the consequences of refusal, are bound to be considered.

[82] In our opinion, the existence of a review condition can properly influence a decision on the term of a discharge permit, but should not obscure the fundamental difference between the two. The consent authority's power of review is to consider changing the conditions of consent to make them more appropriate in the light of the circumstances triggering the review, and the consent-holder's response. The term of the consent is the duration or period for which it may be exercised, on the conditions applicable for the time being. The term implies that after expiry, the question whether consent is to be granted for a further term, or refused, would be the subject of fresh consideration.



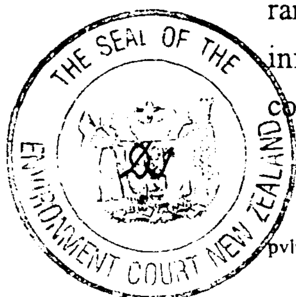
[83] In this case, there is no question that there should be a review condition. It has not been challenged by the appellants. What has to be decided is the length of the term of the consent, bearing in mind that it does contain a power of review.

[84] The main risk to be considered is that management of the plants will not continue to improve, so that the occasional accidental or careless emissions of objectionable odour are not eliminated. We do not downplay the potentially offensive nature of those emissions. However they have been relatively rare and transitory. Given the extent of the commitment shown by the appellants to minimising them, we consider that a shorter term of consent would not be the appropriate response. In our opinion that risk is more appropriately responded to by the power of review.

[85] The next main risk is a possible change in the receiving environment that cannot be foreseen now from the pattern of zoning. By definition we are not able reliably to predict what that change might be. However in our experience such unexpected changes take some years to develop. Bearing in mind the reasonable needs of the appellants for security for investment and future development, it is our judgment that a term as long as 15 years would be an adequate security for the community against change in the receiving environment.

[86] Then we consider that possibility of technological change that would make it inappropriate for the present processes to be continued. That is a question on which there was a difference between the opinions of Dr Brady and Mr Mahon. We accept that there is a possibility that over the next decade there will be developments in rendering process technology or in techniques for containment of odour. If so, the appellants may choose to adopt them of their own initiatives (perhaps encouraged by the regulatory authority). But if they do not do so, the question how long they should be allowed to continue with the present technology must depend mainly on the environmental effects of using it. It is not possible now to make a comparison of those effects with the environmental effects of using the hypothetical new technology.

[87] The appellants' present technology is currently the best practicable option. Their considerable investment in it, the location in an appropriate zone, the relatively rare and transitory environmental effects, and the ability to review the conditions, influence our judgement of the duration for which they should have security of consent before having to make a fresh application in the light of circumstances that



may or may not by then have changed. It is our judgment that the possibility of new technology does not indicate a need for a term as short as ten years.

[88] We have not overlooked the evidence of both parties about terms of consents for other discharge permits for rendering plants and other processing activities. We also accept Mr von Tunzelman's point that a shorter term for the appellants gives their competitors a business advantage. We also accept that the respondent has made real efforts to establish a rational pattern of terms for various discharge permits.

[89] However we do not know all the relevant circumstances of the other operations. It may be that the rendering plants cited are not located in urban areas at all. It may be that if we were deciding the term of those consents, we might have fixed shorter terms than they have been granted. We can only make a judgement on the case before us.

Determination

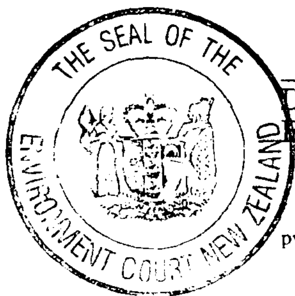
[90] Having considered those aspects of the question, standing back and considering the question more broadly, we have been persuaded that consistent with the statutory purpose of sustainable management, the consent can properly be granted for a longer term than ten years, that the term of 35 years sought by the appellants would be too long, and that an appropriate term would be 14 years.

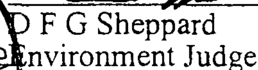
[91] Accordingly, the appeal is allowed to the extent only that the respondent's decision is amended by deleting the expiry date of 31 July 2008 and substituting an expiry date of 31 July 2012.

[92] The question of costs is reserved. If agreement cannot be reached, memoranda may be lodged.

DATED at **AUCKLAND** this 3rd day of July 2001.

For the Court:





D F G Sheppard
Environment Judge