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MEMORANDUM

Date: 28 September 2018

To: **Nick Reuther and Yvette Rodrigo**

From: **Michelle Mehlhopt**

CCC - COMPREHENSIVE STORMWATER DISCHARGE CONSENT - EXISTING ENVIRONMENT

1. You have asked us to consider how the "environment" should be defined for the purposes of considering the Christchurch City Council's (**CCC**) application for a comprehensive stormwater network discharge consent (**CSNDC**).

Executive Summary

2. We are of the view that the "environment" should be considered as if discharges under the existing consents that are to be replaced by the CSNDC have been discontinued and the CSNDC is an application for a new activity, unless the CCC can establish that it is not feasible to do so.

3. However, the environment is not to be considered as if discharges under the existing consents never occurred. Rather, the environment will include any legacy effects of past lawful discharges. This recognises the reality that the receiving waterbodies are, for the most part, heavily modified and have been for some years.

4. For completeness, the existing environment does not include discharges from existing unlawful activities.

Background

5. The CSNDC is intended to authorise discharges of stormwater from CCC's reticulated network, as well as other stormwater discharges from within the urban limits of Christchurch City and from settlements on Banks Peninsula. Stormwater from these areas will ultimately discharge into surface water, coastal water and to land in circumstances where it may enter water. The proposed discharge is a non-complying activity.

6. The application for the CSNDC (**Application**) states the CSNDC is intended to replace three existing stormwater discharge consents (**Existing Consents**).[1]

7. The catchments that will be affected by the CSNDC are generally in poor ecological health, with water quality in surface waterbodies failing to meet Canterbury Land and Water Regional Plan (**LWRP**) water quality outcomes. Water quality issues are also present in the coastal environment, although the Application states that groundwater quality generally meets desired LWRP outcomes.

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[1] Application, Section 1.1: Scope of Consent.

8. In the process of considering the Application, issues have been raised associated with water quality in the receiving environment and how the effects of the CSNDC on that water quality should be considered.

What constitutes the "environment" for the purposes of section 104 RMA?

9. The starting point for determining the scale of effects of the proposed stormwater discharge is determining the environment upon which the effects of the discharge must be assessed.

10. "Environment" is defined in the Resource Management Act 1991 (**RMA**), as:

> **Environment** includes –
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> (a) Ecosystems and their constituent parts, including people and communities; and
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> (b) All natural and physical resources; and
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> (c) Amenity values; and
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> (d) The social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c) of this definition or which are affected by those matters.

11. The scope of what it encompasses has been the subject of numerous decisions in the Courts (particularly in the context of activities authorised under district plans).

12. The leading statement on what constitutes the "environment" for the purposes of section 104 of the RMA remains the Court of Appeal's decision in *Queenstown Lakes District Council v Hawthorn Estate Limited*.[2] In *Hawthorn*, the Court held that:

> [84] … In our view, the word "environment" embraces the future state of the environment as it may be modified by the utilisation of rights to carry out a permitted activity under a District Plan. It also includes the environment as it might be modified by the implementation of resource consents which have been granted at the time a particular application is considered, where it appears likely that those resource consents will be implemented. …

13. This calls for a "real world" approach, not an artificial approach, to what the future environment will be.[3] A consent authority must not minimise the effects of a proposed activity, either by comparing it with an unrealistic possibility allowed by the relevant plan, or by ignoring its effects on what is, or undoubtedly will be, part of the environment in which the activity will take place.[4]

Consideration of the existing environment in a regional consenting framework

14. There is some uncertainty as to how *Hawthorn* (which was decided in the context of district plan consents) applies in the context of resource consents granted by a regional authority, given that regional consents will generally have an expiry date and their renewal is not guaranteed, despite section 124 of the RMA.

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[2] *Queenstown Lakes District Council v Hawthorn Estate Limited* (2006) 12 ELRNZ 299; [2006] NZRMA 424.

[3] *Speargrass Holdings Limited v Queenstown Lakes District Council* [2018] NZHC 1009 at [64] adopting Fogarty's J's approach in *Queenstown Central Ltd v Queenstown Lakes District Council* [2013] NZHC 815, (2013) 17 ELRNZ 585 at [85].

[4] *Speargrass Holdings Limited v Queenstown Lakes District Council* [2018] NZHC 1009 at [64].

15. There has previously been conflicting Environment Court authority regarding what constitutes the "environment" in the context of regional consents. However, the High Court decision of *Ngāti Rangi Trust v Manawatu-Whanganui Regional Council*[5] has clarified the position. Before addressing the High Court's findings in *Ngāti Rangi*, we consider it useful to set out some of the previous differing positions of the Environment Court.

16. In the context of a resource consent application for geothermal abstraction, the Environment Court in *Rotokawa Joint Venture Limited v Waikato Regional Council* stated:[6]

> [108] In applying the existing environment principle to the facts of this case, we accept that the best guidance remains that of the Environment Court in the ***Tauhara*** decision: [*Contact Energy Limited v Waikato Regional Council* EnvC A04/2000 at paragraph 38]
>
> > We hold that consideration is to be given to the effects on the environment as it actually exists now, including the effects of past abstraction of geothermal fluid from the system, whether by Contact or anyone else. In considering the effects in the future of allowing the proposed abstraction, we hold that we have to consider the environment as it is likely to be from time to time, taking into account further effects of past extraction, and effects of further abstraction authorised by existing consents held by Contact or by others…
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> [109] **We agree with the above clear articulation, but in the light of the *Hawthorne* case we would add that we also have to consider the environment as it is likely to be from time to time having regard to the natural recharging process in the event of the consents not being granted.**
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> (emphasis added).

17. In *Marr v Bay of Plenty Regional Council*,[7] the Environment Court considered whether the effects from the discharges from Tasman Mill under existing consents that were sought to be renewed could be taken into account. The Court held that the existing environment of the river must take into account the effects which have already occurred from lawful discharges from the Tasman Mill to date.[8] The Court accepted that the evidence in that case established that the existing environment included:[9]

    a. A long standing modified river system involving a channelized river;

    b. Existing lawful upstream river discharges including geothermal and sewage discharges;

    c. Upstream water quality affected by Ecoli and giardia;

    d. Effects of the river of lawful intake and outfall structures;

    e. Past effects from the above activities.

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[5] *Ngāti Rangi Trust v Manawatu-Whanganui Regional Council* [2016] NZHC 2948.

[6] *Rotokawa Joint Venture Limited v Waikato Regional Council* A041/07 (EC).

[7] *Marr v Bay of Plenty Regional Council* [2010] NZEnvC 347; (2010) 16 ELRNZ 197; 34 TCL 89.

[8] *Marr v Bay of Plenty Regional Council* [2010] NZEnvC 347; (2010) 16 ELRNZ 197; 34 TCL 89 at [62].

[9] *Marr v Bay of Plenty Regional Council* [2010] NZEnvC 347; (2010) 16 ELRNZ 197; 34 TCL 89 at [63].

18. In *Bay of Plenty Regional Council v Fonterra Cooperative Group Ltd* the Environment Court held that assumptions about future expiry of consents and/or their replacement is beyond the range of activities that should be contemplated as part of the existing or future environment and the environment should be taken as it exists at the time, including all operative consents and any consents operating under section 124, overlain by any future activities which were permitted activities and also unimplemented consents (which could be considered at the discretion of the consent authority).[10]

19. However, in *Port Gore Marine Farms v Marlborough District Council* the Environment Court observed that it must imagine the environment as if the three marine farms (seeking renewal) were not actually in it, as if the application was for a new activity, not the renewal of an activity.[11] The Court considered that if it had to take the continued presence of the farms on site into account it would undermine any persons' claims to being adversely affected.[12]

20. The Environment Court decisions in *Marr* and *Port Gore* were both considered by the Environment Court in *New Zealand Energy Ltd v Manawatu-Wanganui Regional Council*[13] in the context of applications for new resource consents, as well as variations to the conditions of existing consents, to expand the Raetihi Hydroelectric Power Scheme's capacity and implement other additional upgrades. The Court held that under normal circumstances of renewal of consents for water take the 'environment' must be determined as the environment that might exist if the existing activity to which the consent relates was discontinued.[14] However, the following circumstances of the case led the Court to a contrary conclusion that the existing environment should be assessed as including the Scheme as currently operated:[15]

    - The fact that the take has been in place for nearly 100 years;
    - The provisions of Objective 5-3(a)(ii) and Policies 5-14(b) and 5-15(b) of One Plan which seek to provide for existing electricity takes and flow regimes prior to other allocations;
    - The fact that the allocation regime established in One Plan has been set after recognition of the effects of existing electricity takes;
    - The controlled activity status given to renewal applications for hydroelectricity takes.

21. The Court concluded:[16]

> This is an unusual case where strong policy protection is in place for continuation of a consented activity, notwithstanding that the activity is time limited by the duration of the consent. Any effects of the Scheme as currently operated are already recognised

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[10] *Bay of Plenty Regional Council v Fonterra Cooperative Group Ltd* [2011] NZEnvC 73; (2011) 16 ELRNZ 338 at [48].

[11] *Port Gore Marine Farms v Marlborough District Council* [2012] NZEnvC 72 at [140].

[12] *Port Gore Marine Farms v Marlborough District Council* [2012] NZEnvC 72 at [140].

[13] *New Zealand Energy Ltd v Manawatu-Whanganui Regional Council* [2016] NZEnvC 59.

[14] *New Zealand Energy Ltd v Manawatu-Whanganui Regional Council* [2016] NZEnvC 59 at [47] – [48].

[15] *New Zealand Energy Ltd v Manawatu-Whanganui Regional Council* [2016] NZEnvC 59 at [48].

[16] *New Zealand Energy Ltd v Manawatu-Whanganui Regional Council* [2016] NZEnvC 59 at [49].

> by the regional community as acceptable, have been allowed for prior to allocation limits being set and the continuation of those effects is sanctioned by regional Rules at the renewal of the consents for the Scheme. Under these circumstances, it is difficult to reach any other conclusion than the receiving environment within which this discretionary application for additional allocation of water is assessed includes the Scheme as currently operated.

22. The Environment Court decision was appealed to the High Court in *Ngāti Rangi Trust v Manawatu-Whanganui Regional Council*[17] where the Court held that the Environment Court had erred in its approach. The High Court stated:

> [62] Mr Ferguson, senior counsel for the Trust, and Mr Jessen, for the Regional Council, distinguished *Marr v Bay of Plenty Regional Council* and *Rodney District Council v Eyres Eco-Park Ltd* on the grounds that Allan J was considering whether activities benefiting from existing use rights under s 10A of the Act formed part of the existing environment in the particular context of a land use and subdivision application. That is quite different from the present case. Water take permits are not permanent and do not carry existing use right protections.
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> [63] Applying the approach taken by the Environment Court in *Marr v Bay of Plenty Regional Council* to the circumstances of this case would cut across the sustainable management objectives of the Act. The effect of not following the approach adopted by the Environment Court in *Port Gore Marine Farms Ltd v Marlborough District Council* when assessing the environmental impacts of a proposed consent is to lock in hydro-electricity water takes and flow rates for so long as the controlled activity status is retained thereby preventing adverse effects being avoided or mitigated.
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> [64] I therefore agree that the approach taken by the Environment Court in *Port Gore Marine Farms Ltd v Marlborough District Council* was the approach which the Environment Court should have adopted in the present case.
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> [65] I am reinforced in my conclusions by two reasons. First, the learned authors of *Environmental and Resource Management Law* note a principle has emerged in which it should not be assumed that existing consents with finite terms will be renewed or renewed on the same conditions. The text says:
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> > Accordingly, the existing environment cannot include, in the context of a renewal application, the effects caused by the activities for which the renewal consents are sought, unless it would be fanciful or unrealistic to assess the existing environment as though those structures authorised by the consent being renewed did not exist…
> >
> > [Derek Nolan *Environmental and Resource Management Law* (5th ed, Lexis Nexis, Wellington, 2015) at 610]
>
> …
>
> [68] In my view, the controlled activity rule is more appropriately applied when the effects on the existing environment are considered without weighing the existing consents in the balance. To analyse the existing environment as excluding the scheme as it currently operates in these circumstances is also feasible. The Makotuku River can be assessed immediately upstream of the NZEL take in order to disregard the current scheme.

23. The High Court focused on the fact that in a re-consenting process, new consents are granted rather than renewals. In the context of the Hydroelectric Power Scheme, the High Court found that the Environment Court's reasoning for departing from the

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[17] *Ngāti Rangi Trust v Manawatu-Whanganui Regional Council* [2016] NZHC 2948.

usual consideration of the existing environment as not including the Scheme in current operation was not particularly compelling:[18]

> … The fact that the take has been in place for nearly 100 years is less relevant when it is appreciated that the resource consents issued in 2003 were granted for a period of five years. The relevant consents have not been granted in perpetuity as recognised in the One plan and the controlled activity rule. They are not in relation to permitted activities. The context is a re-consenting application and in my view the 2003 consents should have been treated as having expired when determining the appeal. The context is different to the line of authorities on the existing environment that has evolved from the Court of Appeal's decision in *Queenstown Lakes District Council v Hawthorn Estate Limited*, where it was determined that the existing environment may include activities in which a decision-maker has no control over, such as granted resource consents that are likely to be implemented.

24. Although the High Court concluded that the context was not sufficiently unusual as to warrant departing from the approach in *Port Gore*, it did not go so far as to say that it was incorrect to undertake that assessment as to whether any unusual circumstances exist. This reflects the position articulated in the commentary cited above, namely that in the context of a renewal application, the existing environment cannot include effects caused by the activities for which the renewal consents are sought, unless it would be fanciful or unrealistic to assess the existing environment as though those structures authorised by the consent being renewed did not exist.[19]

The existing environment in the context of the CSNDC

25. Accordingly, in the context of the CSNDC, we consider that the environment (for the purposes of assessing effects) includes the effects of past lawful discharges but excludes the effects of ongoing discharges under the Existing Consents intended to be replaced, unless it can be established that it would be fanciful or unrealistic to assess the existing environment without those discharges continuing.

26. In the context of the CSNDC Application, the environment should be considered as if the discharges under the existing consents to be replaced have been discontinued, and the CSNDC Application is an application for a new activity. However, that is not to say that the environment should be assessed as if the discharges never occurred. Rather, the environment will include the effects of past lawful discharges including, for example, the build-up of sediment and the effects of past discharges on aquatic ecology. The receiving water bodies are, for the most part, heavily modified and have been for some years.

27. This approach is consistent with the power of a regional council to regulate existing activities. For example, existing permitted and consented activities in a regional planning context have limited protection via existing use rights in the Act, compared to the more fulsome protection afforded to activities lawfully established under a district plan.[20]

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[18] *Ngāti Rangi Trust v Manawatu-Whanganui Regional Council* [2016] NZHC 2948 at [66].

[19] Bal Matheson and Daniel Minhinnick "Water" in Derek Nolan (ed) *Environmental and Resource Management Law* (6th ed, LexisNexis, Wellington, 2018), at [8.43].

[20] Resource Management Act 1991, ss 20A and 10.

28. If the effects of activities authorised by consents issued by a regional authority always formed part of the environment it would be difficult to regulate activities in the future. This is because it would be hard to argue, particularly in the context of replacement consents, that the effects are more than minor compared to the status quo.

29. Assessing the CSNDC as if the Existing Consents to be replaced are not part of the environment allows a more thorough assessment of effects and, in light of the lack of knowledge about the actual contribution of stormwater discharges to water quality, follows the precautionary approach recommended in the Canterbury Regional Policy Statement.[21]

30. In relation to whether it is feasible to assess the existing environment as including the continuance of discharges under the Existing Consents to be replaced, we consider that this is a matter for the CCC to establish. Relevant factors to consider are likely to include:

    a. The receiving water bodies are, for the most part, heavily modified and have been for some years;

    b. Stormwater discharge via CCC reticulated networks is a long existing activity;

    c. The LWRP promotes disposal of stormwater by way of a reticulated system and water quality targets within the LWRP recognise the lower water quality experienced in urban waterbodies.[22]

31. We note however, the factors set out above in *New Zealand Energy Limited v Manawatu-Whanganui Regional Council* were not considered to be particularly compelling by the High Court in *Ngati Rangi Trust*.

32. For completeness, we have also considered the effects from existing unlawful activities. The existing environment should not be assessed in a way that includes existing unlawful activities.[23] This is on the basis that, under section 84 of the RMA, a Council has a duty to enforce its plan, and at any time, an unlawful activity might be closed down.

Conclusion

33. For the purposes of the CSNDC Application, we are of the view that the environment should be considered as if discharges under the Existing Consents to be replaced have been discontinued, and it is an application for a new activity, unless the CCC can establish that it is not feasible to do so. The environment is however, not to be considered as if those discharges never occurred. Rather, the environment will include the legacy effects of past lawful discharges.

Wynn Williams

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[21] Canterbury Regional Policy Statement, Policy 7.3.12.

[22] Canterbury Land and Water Regional Plan, Policies 4.15 to 4.17.

[23] *Guilty As Limited* [2010] NZEnvC 191 at [38].