BEFORE THE HEARING COMMISSIONERS
APPOINTED BY CANTERBURY REGIONAL COUNCIL

UNDER	the Resource Management Act 1991
AND	
IN THE MATTER	of application CRC190445 by the Christchurch City Council for a comprehensive resource consent to discharge stormwater from within the Christchurch City area and Banks Peninsula settlements on or into land, water and into coastal environments

LEGAL SUBMISSIONS ON BEHALF OF CANTERBURY REGIONAL COUNCIL
14 November 2018

TABLED AT HEARING

Application: .....

.....

Date: 14/11/2018

PO Box 4341 CHRISTCHURCH 8140
DX WX11179
Tel +64 3 379 7622
Fax +64 379 2467

Solicitor: M A Mehlhopt
(michelle.mehlhopt@wynnwilliams.co.nz)

WYNNWILLIAMS

MAY IT PLEASE THE HEARING COMMISSIONERS

1 These submissions provide an overview of the key remaining issues in relation to the application by Christchurch City Council (**CCC**) for a Comprehensive Stormwater Network Discharge Consent (**CSDNC**) and address some of the legal matters, where appropriate, that have been raised during the hearing.

2 CCC and CRC have worked collaboratively through this process and as a result there are few remaining areas of disagreement between the Councils, including in relation to matters raised in submissions.

3 Key outstanding issues in relation to the CSDNC include:

(a) The definition of the "stormwater network";

(b) Conditions that provide an ability to continue to exclude some high risk sites in exceptional circumstances;

(c) The refinement of the Christchurch Contaminant Load Model (**C-CLM**) and development of catchment specific contaminant load targets;

(d) The requirement for an independent Stormwater Technical Advisory Panel;

(e) The number of industrial site audits per year;

(f) Use of "reasonable endeavours", "reasonably practicable measures", "all reasonably practicable measures" or "best practicable option" in consent conditions;

(g) Whether the adverse effects of the proposal are more than minor for the purposes of section 104D(1)(a); and

(h) Duration of consent.

The definition of stormwater network

4 The CCC has proposed to include the Ōtākaro/Avon River, the Huritīni/Halswell River, the Ōpāwaho/Heathcote River, the Ōtukaikino River and the Pūharakekenui/Styx River and their tributaries as part of the definition of 'stormwater network' in the CSNDC. It is understood that the intention of including these rivers and their tributaries is so that an additional level of service can be provided such that the direct

discharges from individual sites to these waterways is also captured by the CSNDC.

5 This approach is unusual and has raised questions as to what can properly be considered to be the receiving environment for the purposes of assessing effects, given that these waterways that would form part of the receiving environment are proposed to be defined as forming part of the stormwater network itself.

6 The intention by CCC to include direct discharges from individual sites to these waterways and some discharges from individual sites onto and into land is supported. However, it is considered that this intention could be more appropriately achieved by replacing the definition of 'stormwater network' with the definition of reticulated stormwater system from the LWRP and amending Proposed Condition 1 to reflect that the CSNDC authorises discharges from the stormwater network (as defined in the LWRP) and direct discharges to surface water bodies (both natural and artificial) from individual sites that do not occur via the CCC's network that are to be covered by the CSNDC. This would achieve the CCC's desired level of service, whilst maintaining a clear distinction between the network and receiving environment.

The ability to exclude high risk sites post 2025 and the mechanism to achieve this in 'exceptional circumstances'

7 Policy 4.16A of the LWRP provides that from 1 January 2025 operators of reticulated stormwater systems are to account for and be responsible for all stormwater discharged from the reticulated system.

8 It is submitted that the default position should be that all sites be included post 2025. However, it is acknowledged that there may be exceptional circumstances where is it is appropriate for a site that poses an unacceptably high risk to the environment to be excluded from the CSNDC so that the discharger is required to obtain a separate consent from CRC.

9 This potential ability to exclude sites in exceptional circumstances recognises that the CCC has limited enforcement powers under its existing Bylaw in relation to sites with existing approvals. In the context of a new development or redevelopment, the activity is likely to require a building consent, land use consent or subdivision consent from the CCC,

together with an approval from CCC under the Bylaw. In those circumstances, the CCC would be able to impose appropriate standards or conditions, against which it can enforce compliance either under the Building Act, RMA or the Bylaw. However, for existing sites that do not require a consent and already have approval under the Bylaw, there is no ability for the CCC to impose such standards or conditions without an amendment to the Bylaw. As a result, the CCC's ability to take steps to address the adverse effects from such a site are limited.

10 Where the CCC has exhausted all its feasible options to address the adverse effects of the activity, it may be appropriate for the CCC to exclude the site from the CSNDC. In order for such a condition to have sufficient certainty and achieve the intention of Policy 4.16A, there should be specific criteria and a requirement for CRC to certify those criteria as being met, before a site is excluded.

11 An alternative to the potential exclusion of sites from the CSNDC is a transfer of powers under section 33 of the RMA or cross-delegation of powers.

The refinement of the C-CLM and development of catchment specific contaminant load targets

12 Discussions have continued between CRC and CCC in relation to the C-CLM following expert conferencing and the issuing of the Joint Expert Witness Statement.

13 CRC Officers recommend that there be a requirement to achieve city-wide reduction standards and catchment specific targets to be developed through the SMPs, whilst also allowing for the C-CLM to be refined or alternative models developed to more accurately model contaminant loads and concentrations.

14 Ms Stevenson and Mr Reuther will address this.

Stormwater Technical Advisory Panel

15 The section 42A report recommended the establishment of a Stormwater Technical Advisory Panel (**Stormwater TAP**). The intention is that the Stormwater TAP provide an independent review of, and technical input into, SMPs, as well as investigations and feasibility

studies proposed by the Applicant. The TAP would provide advice and recommendations only. The CCC would still retain its decision making function and the relevant certification function would still lie with CRC.

16 Mr Reuther will speak further to his recommendation.

The number of industrial site audits per year

17 It is considered that industrial site audits are critical to the success of the CSNDC and CRC officers recommend that at least 30 audits should be undertaken each year, with a focus on both high and medium risk sites.

Reasonable endeavours, all reasonably practicable measures and best practicable option

18 Throughout the hearing, there have been questions raised regarding the phrases 'reasonable endeavours', 'reasonably practicable measures' and 'best practicable option' and what these respective phrases mean in the context of the consent conditions.

19 The phrase 'reasonable endeavours' was included in a number of the consent conditions proposed by the Applicant. Concern was raised in the section 42A report as to the threshold of effort required by the phrase "reasonable endeavours" and the lack of clarity as to what the consent holder is required to do to meet the obligations imposed by the conditions. Recommendations were made to replace the phrase "reasonable endeavours" with "all reasonably practicable measures".

20 The Applicant has included "reasonably practicable measures" in a number of the conditions in the revised set of conditions provided at the commencement of the hearing. Ms West has also noted some additional conditions that should also be amended.

21 There has been discussion during the hearing as to whether the reference to "reasonably practicable measures" rather than "all reasonably practicable measures" is deliberate and whether there is a difference between the two phrases and also whether there is a difference between "all reasonably practicable measures" and "best practicable option". These submissions seek to clarify the meaning of each of the respective phrases.

Reasonable endeavours

22 Whilst "reasonable endeavours" has previously been used in consent conditions, the term has not been judicially considered in the context of resource consent conditions. However, both "reasonable endeavours" and "best endeavours" have been considered in contract law jurisprudence.

23 "Reasonable endeavours" consists of a course of action that an ordinary competent or reasonable person might carry out. Unlike "best endeavours", "reasonable endeavours" does not require the exhaustion of all courses of action, nor does it require any commercial sacrifice.[1]

24 The concern raised in the section 42A report with the use of "reasonable endeavours" in the consent conditions is that it is not sufficiently clear what is required from the consent holder to comply with the condition as the phrase provides the consent holder with considerable autonomy as to the threshold of effort imposed by the condition.

25 "Best endeavours" is also commonly used in contract law. The High Court in *Artifakts Design Group Ltd v N P Rigg Ltd* noted that best endeavours "does not require the person who undertakes the obligation to go beyond the bounds of reason; he is required to do all he reasonably can in the circumstances to achieve the contractual object, but no more."[2]

All reasonably practicable measures

26 It is submitted that "all reasonably practicable measures" imposes more onerous criteria as to the standard of compliance than "reasonable endeavours".

27 The Environment Court in *Royal Forest & Bird Protection Society of New Zealand Inc v Whakatane District Council*[3] considered the phrase "reasonably practicable" in the context of section 32 of the RMA and the distinction between practicable and reasonably practicable. In doing so

---

[1] Quentin Lowcay, Leah Hamilton and Brendan Kevany "Reasonable, best and other endeavours" NZLJ (2012) 349 citing Rhodia International Holdings Ltd v Huntsman International LLC [2007] EWHC 292 (Comm).
[2] *Artifakts Design Group Ltd v N P Rigg Ltd* [1993] 1 NZLR 196, (1992) 4 NZBLC 102, 689 at 50, citing *Hospital Products Ltd v US Surgical Corporation* (1984) 156 CLR 41.
[3] *Royal Forest & Bird Protection Society of New Zealand Inc v Whakatane District Council* [2017] NZEnvC 51.

it examined the definition of "reasonably practicable" in the Health and Safety at Work Act 2015 and similar definitions found in other legislation concerned with matters of health and safety and the protection of property.[4] The Court considered that the approach consistently taken in other legislation and by other Courts to the assessment of the correct approach to or the boundaries of what is "practicable" in relation to a duty to ensure the health and safety of people and the protection of property could be analogous to the approach which may be taken to protecting, or otherwise dealing with adverse effects on, the environment under the RMA.[5]

28 The following are key points summarised from the Judgment:

(a) The word "reasonably" is often used to qualify other words both in legislation and in case law. It has been held in relation to the predecessor provision to s 6(a) of the Act that it may be an implied qualification of the word "necessary." Similarly in relation to s 341(2)(a) of the Act, the same qualification has been implied on the basis that it is unlikely that the legislature envisaged the unreasonable.[11] In the context of an earlier version of s 171(1)(c) of the Act, it has been held to allow some tolerance to the meaning of "necessary" as falling between expedient or desirable on the one hand and essential on the other.[12] There does not appear to be any reason why it should be interpreted differently when used (whether expressly or by implication) in the phrase "reasonably practicable."[6]

(b) "Reasonably practicable" is a narrower term than "physically possible" and implies a computation of the quantum of risk against the measures involved in averting the risk (in money, time or trouble), so that if there is a gross disproportion between them, then extensive measures are not required to meet an insufficient risk.[7]

---

[4] Including section 2 of the Electricity Act 992, section 2 of the Gas Act 1992, section 69 H of the Health Act 1956 and section 5 of the Railways Act 2005.
[5] *Royal Forest & Bird Protection Society of New Zealand Inc v Whakatane District Council* [2017] NZEnvC 51 at [52].
[6] *Royal Forest & Bird Protection Society of New Zealand Inc v Whakatane District Council* [2017] NZEnvC 51 at [48].
[7] *Royal Forest & Bird Protection Society of New Zealand Inc v Whakatane District Council* [2017] NZEnvC 51 at [51].

(c) "Practicable" has been held to mean "possible to be accomplished with known means or resources" and synonymous with "feasible", being more than merely a possibility and including consideration of the context of the proceeding, the costs involved and other matters of practical convenience.[8]

(d) The obligation to do something which is "reasonably practicable" is not absolute, but is an objective test which must be considered in relation to the purpose of the requirement and the problems involved in complying with it, such that a weighting exercise is involved with the weight of the considerations varying according to the circumstances.

29 The Court concluded that in considering the reasonably practicable options for achieving the objectives of the proposed District Plan in that case, regard should be had to, among other things:[9]

(a) The nature of the activity and its effects;

(b) The sensitivity of the environment to adverse effects generally and to the identified effects of the activity in particular;

(c) The likelihood of adverse effects occurring;

(d) The financial implications and other effects to the environment of the option compared to the others;

(e) The current state of knowledge of the activity, its effects, the likelihood of adverse effects and the availability of suitable ways to avoid or mitigate those effects;

(f) The likelihood of success of the option; and

(g) An allowance of some tolerance in such considerations.

30 It is submitted that the phrase "all reasonably practicable measures" is a different test to "reasonably practicable measures". For example, in Condition 20, the consent holder is required to use "reasonably practicable measures" to mitigate the effects of the discharge of stormwater on surface water quality, instream sediment quality, aquatic

---

[8] *Royal Forest & Bird Protection Society of New Zealand Inc v Whakatane District Council* [2017] NZEnvC 51 at [51].
[9] *Royal Forest & Bird Protection Society of New Zealand Inc v Whakatane District Council* [2017] NZEnvC 51 at [53].

ecology health and mana whenua values. The use of "reasonably practicable measures" means that the measures used by the consent holder must be reasonably practicable. If this was replaced with "all reasonable practicable measures" the consent holder would be required to use all measures that are reasonably practicable. This, in my submission, is a higher standard.

Best Practicable Option

31 The requirement to adopt the best practicable option appears in the RMA, relevantly in respect of conditions of discharge permits in section 108(2)(e), which provides that a resource consent may include a condition in respect of a discharge permit, to do something that would otherwise contravene section 15, requiring the consent 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.

32 The ability to impose such a condition is subject to section 108(8) which requires the consent authority to 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.

33 The term best practicable option is defined in section 2 of the Act as follows:

> **Best practicable option**, in relation to a discharge of a contaminant or an emission of noise, means the best method for preventing or minimising the adverse effects on the environment having regard, among other things, to –
>
> (a) The nature of the discharge or emission and the sensitivity of the receiving environment to adverse effects; and

(b) The financial implications, and the effects on the environment, of that option when compared with other options; and

(c) The current state of technical knowledge and the likelihood that the option can be successfully applied:

34 In *Auckland Kart Club Inc v Auckland City Council* the Planning Tribunal, as it then was, considered "best practicable option" in the context of section 16 and the duty to avoid unreasonable noise, finding that the best practicable option in that case was:[10]

> the optimum combination of all the methods available to the kart club to limit the noise damage to the residents in terms of the provisions of section 2(1) – to the greatest extent achievable.

35 Further, in *Medical Officer of Health v Canterbury Regional Council* the Court emphasised that the practical effect of a best practicable option condition is to ensure:[11]

> … that the contaminants discharged by the applicant are at a level which on the best scientific and technical information available constitute the best practicable option of minimising adverse effects on the environment. The key word in our view is "practicable".

36 Best Practicable Option means the best method for preventing or minimising the adverse effects which in my submission is a higher standard than "all reasonably practicable measures."

Whether the adverse effects of the proposal are more than minor

37 Having heard the evidence presented to date[12], Mr Reuther considers that in the absence of evidence from Nga Runanga there is insufficient certainty for him to reach a conclusion that the adverse effects on cultural values will be minor. The provision of the letter of non-

---

[10] *Auckland Kart Club v Auckland City Council* (Planning Tribunal, A 124/92, 22 October 1992) at 22-23.
[11] *Medical Officer of Health v Canterbury Regional Council* [1995] NZRMA 49 at 58.
[12] It is noted that when these legal submissions were prepared, Mr Pauling had not yet presented evidence for the CCC.

opposition from Mahaanui and the Deed of Agreement between Nga Runanga, TRoNT, Mahaanui and Council has provided a greater level of comfort. However, it is noted that the letter is not a written approval, and the effects on cultural values must still be considered.

38 In relation to effects, the existing environment is particularly relevant in the context of this application. This has been addressed in legal advice attached as Appendix 10 to the section 42A Officer Report and in Opening Legal Submissions for the Christchurch City Council.

39 It is agreed that the environment in this context includes the legacy effects of past discharges under the existing consents. However, questions have been raised as to whether the continuance of discharges under the existing consents to be replaced by the CSNDC should be considered as part of the existing environment. The High Court has confirmed that 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.[13] This is appropriate given that in a re-consenting process, new consents are granted rather than renewals, and 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 difficult to argue, that the effects are more than minor compared to the status quo.

40 In my submission, the Commissioners will need to determine whether it is feasible to analyse the existing environment as excluding the existing consents. It is acknowledged that the Council cannot just "turn off the tap", or stop the activity. Rain is going to continue to fall and stormwater will continue to be discharged to the receiving environment. Therefore, it may be fanciful or unrealistic to assess the existing environment as though those discharges did not exist.

41 Should the Commissioners find that it is not feasible to consider the environment as if the discharges have been discontinued, there are still some remaining concerns that there is the potential for adverse effects

---

[13] *Ngati Rangi Trust v Manawatu-Whangaui Regional Council* [2016] NZHC 2948 at [65].

on surface water and coastal water quality to be more than minor. Council Officers will address these remaining concerns when they present.

Consent duration

42 Mr Reuther will address consent duration in his presentation. However, it is appropriate at this point to address the weight to be given to Policy 4.11 of the LWRP.

43 Policy 4.11 of the LWRP, as amended by Plan Change 5 provides:[14]

> 4.11 The setting and attainment of catchment specific water quality and quantity outcomes and limits is enabled through:
>
> (a) limiting the duration of any resource consent granted under the region-wide rules in this Plan to a period not exceeding five years past the expected notification date (as set out in the Council's Progressive Implementation Programme) of any plan change that will introduce water quality or water quantity provisions into Sections 6 – 15 of this Plan; but
>
> (b) allowing, where appropriate, a longer resource consent duration for discharge permits granted to irrigation schemes or principal water suppliers under the region-wide nutrient management rules in this Plan, provided those permits include conditions that restrict the nitrogen loss from the land and enable a review of the consent under section 128(1) of the RMA.

44 Plan Change 5 is currently beyond challenge. Although the rules in Plan Change 5 do not yet have legal effect, it is submitted that substantial weight can be given to the policy.

45 By limiting consent duration to a period of 5 years past the notification date of any plan change set out in the Council's Progressive Implementation Programme (**PIP**), Policy 4.11 seeks to ensure that consents granted now do not undermine the Council's ability to implement any water quality and/or water quantity limits introduced in these future plan changes in the LWRP.

46 The Hearing Panel is required to have regard to Policy 4.11. Policy 4.11 is phrased in directive terms. However, it is not the sole consideration when deciding on an appropriate consent duration. Other factors including those set out in the section 42A Officer Report and Legal Submissions for the CCC, including economic factors, the life of the

[14] A clean version of the decisions version is shown.

infrastructure, the ability to monitor and achieve improvements over a short duration and certainty for the CCC will also be relevant.

47 These factors need to be balanced with the direction in Policy 4.11, the implementation of any new planning framework to be introduced as set out in the PIP, and the general thrust of the National Policy for Freshwater Management to maintain or improve water quality and the LWRP that discharges meet water quality outcomes and limits contained in the Plan.

48 While Policy 4.11(b) provides that the Council may grant a discharge permit with a longer consent duration when a review condition is imposed on the permit, it only applies to discharge permits granted to irrigation schemes or principal water suppliers. However, it is submitted that this does not prohibit a resource consent being granted with a longer duration in other circumstances. It is considered that the review condition proposed by the CCC addresses the concern that the granting of a longer consent duration may undermine the Council's ability to implement any limits introduced in the Christchurch West-Melton sub-region.

49 When Policy 4.11 is weighed against other factors such as the certainty required by CCC, the level of investment in both the infrastructure and the consenting process and the proposed improvements in water quality over the life of the consent, with monitoring and adaptive management conditions to achieve this, it is submitted that a longer consent duration may be considered, subject to the imposition of a review condition enabling the Council to review the consent following the notification and/or making operative of the Christchurch-West Melton sub-region plan change to the LWRP.

M A Mehlhopt
14 November 2018