Before Independent Commissioners Appointed by the Canterbury Regional Council and Selwyn District Council

IN THE MATTER OF	The Resource Management Act 1991
AND	
IN THE MATTER OF	Applications CRC192408, CRC192409, CRC192410, CRC192411, CRC192412, CRC192413 and CRC192414 by Fulton Hogan Limited for a suite of resource consents to establish a quarry operation

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SUMMARY STATEMENT

SECTION 42A REPORTING OFFICER
CANTERBURY REGIONAL COUNCIL
PLANNING – HANNAH LOUISE GOSLIN

DATED: 11 DECEMBER 2019

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1. INTRODUCTION

1.1 My full name is Hannah Louise Goslin. I am a Resource Management Consultant at Incite CHCH Ltd. An introduction to Incite and an explanation of my qualifications and experience is provided in my section 42A Report.

1.2 While this is a Council Hearing, I acknowledge that I have read the Environment Court's Code of Conduct for Expert Witnesses as contained in section 7 of the Environment Court Practice Note 2014, and have complied with it in the preparation of this summary.

2. SCOPE OF SUMMARY

2.1 The purpose of this summary is to update my planning assessment provided in my section 42A Report in light of the Joint Witness Statements[1] and matters that have been discussed during the course of this hearing, this includes responding to questions raised by the Panel. The summary that follows will focus on matters consistent with the functions of the Regional Council:

(a) NESAQ Regulation 17(1);

[1] JWS

(b) Dust;

(c) Updates to objective and policy assessment of the CARP;

(d) Water permits;

(e) Groundwater quality and future land use;

(f) Duration;

(g) Responses to questions from the Panel arising during the Hearing;

(h) Other matters; and

(i) Draft consent conditions.

3. NESAQ REGULATION 17(1)

3.1 To briefly summarise, my section 42A Report concluded that the applicant, had not demonstrated the discharge would not be *"likely, at any time"*, to increase the concentration of PM_{10} in the polluted Christchurch Airshed by more than 2.5µ/m^3. On this basis, I considered that compliance with Regulation 17(1) was unable to be achieved, and recommended the application be declined as directed by Regulation 17(1).

3.2 Interpretation of the term 'likely, at any time' has been a key discussion point during this hearing. I agree with the interpretation of the term 'likely' provided at paragraph (7.8) of Ms Rushton's evidence in chief[2], this being the Oxford Dictionary definition that "likely" means *"probable or expected".*

3.3 In light of the conclusions reached in the second JWS-Air (dated 9 December 2019), Ms Ryan's summary statement concludes that, in her view:

"…a scaling factor of 10 applied to the incremental PM_{10} measurement results can be considered conservative, such that it demonstrates the threshold increase of 2.5 µg/m^3 as a 24-hour average can be complied with in numerical terms."

3.4 Ms Ryan goes on to highlight this conclusion is reached is on the proviso that:

[2] Dated 11 October 2019

"…those activities undertaken at the boundary with the airshed are very well controlled at all times, and that the other monitoring and management measures are applied as proposed."

3.5 Based on Ms Ryan's conclusions, it could be considered that when undertaking activities near the airshed boundary it is likely the threshold in Regulation 17(1) can be met. Although, I emphasise that this is on the basis that the applicant maintains a very high level of dust control at all times, leaving no ability for complacency or error.

3.6 The Panel have requested the applicant provide further information regarding:

(a) The quantity of water required to adequately supress dust as proposed; and

(b) The proposed methodology to supress dust outside hours of operation and at night.

3.7 I agree that these matters are crucial for the Panel's determination on whether the applicant is able to undertake mitigation measures to the extent proposed. In my view, subject to these issues being resolved and the adoption of additional mitigation measures as proposed by Ms Ryan in her summary statement the restriction presented by Regulation 17(1), may be overcome, and the option to grant the consent may be available.

3.8 If the Panel are not satisfied that the threshold in Regulation 17(1) can be met, there is still the PM_{10} offsetting proposal in accordance with Regulation 17(3) which could be further advanced by the applicant.

4. DUST

4.1 My section 42A report concluded the proposal is inconsistent with and contrary to some of the relevant objectives and policies in the RPS[3] and CARP[4] relevant to ambient air quality. This was primarily based on the applicant not having access to an adequate volume of water to meet their anticipated demand which could negatively impact on their ability to suppress dust at the site.

[3] Canterbury Regional Policy Statement
[4] Canterbury Air Regional Plan

4.2 Paragraph (35) of Mr van Nieuwkerk's evidence in chief considers an estimated annual volume of 112,375m^3 would be reasonable to meet the water needs of the quarry. It is concluded in paragraph (36) of Mr van Nieuwkerk's evidence in chief that peak demand for the quarry can be met under the conditions of CRC182422. The annual volume determined by Mr Just in the JWS-Groundwater Quantity, is greater than the amount of water required by the applicant. Therefore, it appears that there could be adequate water available to meet anticipated demand, but I consider further information regarding the anticipated demand would be desirable, given many dust mitigation measures are reliant on there being sufficient water available.

4.3 If the applicant is able to provide additional information to the Panel such that it is considered there is sufficient water available for the applicant to undertake dust mitigation as proposed, and the restriction presented by the NESAQ is able to be overcome, I maintain the view expressed in my section 42A report at paragraph (247) and consider there is potential for those within 250m of the proposed quarry site to experience dust nuisance or amenity effects that are minor from time to time.

5. UPDATES TO OBJECTIVE AND POLICY ASSESSMENT

5.1 In paragraphs (485) to (513) of my section 42A report, I provide an assessment of the relevant provisions of the CARP. In brief, I concluded the application was inconsistent with and contrary to some of the relevant objectives and policies in the CARP.

5.2 On the basis of Ms Ryan's updated conclusions in her summary statement and based on there being sufficient water available to undertake all dust mitigation measures as proposed, I consider the proposal can be considered as being generally consistent with the relevant objectives and policies of the CARP.

6. WATER PERMITS

6.1 There appears to be some confusion in relation to the application for a new water permit[5] to "use" water and the application to change the conditions of the existing water permit[6] to "take and use" water. The intent of this section is

[5] CRC192414
[6] CRC182422

to clarify these matters for the Panel and changes that have occurred following the circulation of my section 42A report.

6.2 The original application sought to change the conditions of the existing water permit to include a new use, being that for aggregate washing[7] and dust suppression. As discussed in paragraphs (22) and (23) of my section 42A report, I summarise legal advice sought by CRC to determine whether a new "use" permit is able to be applied for. As outlined in this legal advice, the CRC considers that the proposed new use of water is outside the scope of the existing consent, and must be applied for as a new water use permit, rather than a change to the existing water permit. Following this advice from the CRC, the applicant applied for a new "use" permit and requested that both the application for the new permit, and variation to the existing permit were publicly notified. The applicant requested that both options remain in process to allow the hearing panel to determine the most appropriate consenting pathway, should the application for the new use of water be granted.

6.3 Irrespective of which consenting pathway is preferred, the application is for a new use of water, and the applicant is not proposing to take any additional water to what is already authorised under the existing water permit. At paragraph (332) of my section 42A report, I highlight the importance of an annual volume limit that accurately reflects the scope of the existing consent to ensure that no additional water is taken.

6.4 Appendix 7 of my section 42A Report recommended changes to the conditions of the existing water permit, including an annual volume and water metering conditions in accordance with the Resource Management (Measuring and Reporting of Water Takes) Regulations 2010. I recommended these changes on the understanding that the applicant had applied for a change to the conditions of the existing water permit. At conferencing for Planning it was discussed that the applicant no longer wished to make changes to the existing water permit, however it is noted that this application to change conditions is yet to be withdrawn. Should the applicant withdraw the application to change the conditions of the existing water permit I am comfortable that an annual volume and water metering regulations are able to be included in the new use permit if the Hearing Panel decide to grant the consent. I have recommended a draft set of conditions

[7] This activity formed part of the original application, but was removed from the proposal in the second section 92 response (dated August 2019).

appended to this summary. Both the new use permit and change of conditions applications are before you as a Panel and I consider there is appropriate scope to include the conditions on either permit.

6.5 There also seems to be some confusion in relation to the two different annual volumes[8] discussed by Mr Just in his memorandum[9] and the JWS – Groundwater Quantity.

6.6 Schedule 10 of the CLWRP provides three methods for determining the seasonal irrigation demand. The applicant first applied Method 3 of Schedule 10 (in the response to the CRC's request for further information). However, in evidence, the applicant also referred to the Irricalc method which is Method 2 in Schedule 10 (evidence in chief of Mr Van Nieuwkerk). Given that the applicant referenced both Methods 2 and 3, Mr Just calculated annual volumes using both methods, and advised that the annual volumes calculated are 96,489 m^3 using Method 3, and 119,920 m^3 using Method 2. Consequently, Mr Just agreed in the JWS that an annual volume of 119,920 m^3 is appropriate, being the higher of the two annual volumes calculated in accordance with Schedule 10.

6.7 In summary, the two volumes arise because two different methods are able to be used. The CLWRP provides for any of the three methods to be used to determine annual volume, and as stated in Mr Just's Memorandum:

"The use of any of the three methods in the schedule is equally valid in determining the annual volume required for irrigation."

6.8 Based on the conclusions in the JWS – Groundwater Quantity, I have changed the appropriate Annual Volume recommendation in my section 42A Report to 119, 920m^3 (paragraphs 335 and 336).

7. GROUNDWATER QUALITY AND FUTURE LAND USE

7.1 To summarise, my section 42A report concluded that there is potential for future land use activities to be undertaken on the site which could result in unacceptable risk to groundwater quality long term. Based on this risk, I recommended conditions be included that require a covenant to be listed on each land title associated with the site excluding high intensity land uses that may cause effects on groundwater quality in future.

[8] Being 96,489m^3 and 119,920m^3
[9] Appended to my Section 42A Report as Appendix 6.

7.2 After considering evidence presented during the course of this hearing and the JWS-Groundwater Quality, I maintain the recommendation in my section 42A report and consider covenants should be applied on all land titles associated with the site. I also concur with the Panel's assumption that there could be constraints on the applicant's ability to source suitable cleanfill, therefore the starting point for the consideration of risk to groundwater quality should be based on there being no cleanfill deposited at the site. With this in mind, I consider it is unreasonable to assume that future planning documents will address the changes made to this site in relation to separation to groundwater, and other quarry sites on a site by site basis.

8. DURATION

8.1 In my section 42A Report, I recommended a duration of 13 years, primarily based on policy 4.11 of the CLWRP and aligning durations with the expiry date of the existing water permit[10] authorising the take.

8.2 Duration was a topic of discussion at conferencing of Planners, the conclusions of which are documented in the JWS-Planning. If the Panel consider the resource consents are able to be granted, then I consider 13 years is an appropriate starting point in establishing a duration.

9. RESPONSES TO QUESTIONS FROM THE PANEL ARISING FROM THE HEARING

Water Permit Conditions

9.1 Commissioner van Voorthuysen asked for Reporting Officers to consider if all required conditions are included on the new use permit, following the amendments that have been made during the course of this hearing, I consider they are now appropriate.

Alternative Domestic Water Supplies

9.2 Commissioner McGarry asked whether there are any resource consents for land-based quarry activities that require alternative water supplies in the event domestic bores are contaminated. Based on my review of CRC's Consents Database, there are no land-based quarry activities that include such conditions. However, I consider such conditions are not uncommon,

[10] CRC182422

and are included on a range of discharge permits within the Canterbury Region.[11]

Enforceability of conditions at the expiry of resource consent

9.3 Commissioner van Voorthuysen asked the Reporting Officers to provide a legal opinion on the question *"Can conditions requiring remediation endure post expiry of consent?"* A legal opinion in relation to this matter is appended to this Statement. In summary, resource consent conditions, including those in relation to rehabilitation and monitoring, can endure following the expiry of the resource consent provided:

(a) "The conditions are clearly framed and are intended to be complied with at the end of or after the consented activity; and

(b) The conditions do not necessitate work that would otherwise require a resource consent."

9.4 Although, it is highlighted that there is limited caselaw available that supports this view, and the caselaw that does support this approach has only arisen from the Environment Court context. Given this risk, the legal opinion recommends that:

"…it may be appropriate for the conditions requiring the rehabilitation of the site, and any monitoring following the rehabilitation of the site, be completed prior to the expiry of the resource consent. This would ensure that any uncertainty concerning the enforceability of the conditions do not impact the successful rehabilitation of the site."

9.5 To ensure rehabilitation is undertaken prior to the expiry of resource consents (if consents are granted), I recommend conditions be amended to require rehabilitation of the site to be undertaken prior to the expiry of the resource consent.

Covenants and restriction on future land use

9.6 Commissioner McGarry requested the regional council provided confirmation on whether covenants have formed consent conditions to manage the effects of future land use at the conclusion of cleanfilling and rehabilitation of land-based quarries in the Canterbury Region.

[11] Ravensdown (CRC040505, Condition (38)), Silver Fern Farms (CRC191919, Condition (17)), Van den Brink Poultry (CRC162233, Condition (29)).

9.7 Based on my review of CRC's consents database I am aware of three land use consents for quarry based activities which include conditions requiring covenants be included on land titles. These are land use consents for Frews Quarry at 61 Savills Road in Harewood, granted in 2016[12], Road Metals for various sites within the land bound by Buchanans Road and West Coast Road, granted in 2018[13] and Road Metals at Wards Road, granted in 2013[14].

Site preparation staging

9.8 The Panel requested the Reporting Officers provide a response to staging as proposed by Ms Eager in her statement on behalf of the Templeton Residents Association. While I consider the staging of the site is primarily set out in the conditions of the district council land use consent, I consider condition (15) of the air discharge permit provided as part of the most recent set of draft conditions[15] requires the establishment of bunds prior to quarrying operations commencing on site.

Versatile soils

9.9 The Panel requested the Reporting Officers provide a summary and assessment of provisions related to versatile soils. I understand Mr Henderson will address this matter in more detail, but note there are no provisions addressing versatile soils in the CLWRP.

Validity of water level records from M36/0257

9.10 Commissioner van Voorthuysen asked about the validity of water level records of well M36/0257 in determining the highest groundwater level at the site. In discussions with Dr Scott I understand reliance on the water level for this bore would not have been relied on heavily given:

(a) The record for well M36/0257 was not continuous (monitoring ceased in 1989 and was not measured again until 2017);

(b) The well reference level is not accurately surveyed; and

(c) The well is deep (63m) therefore water levels may not be a true reflection of shallow groundwater at the site.

[12] CRC153916
[13] CRC181273
[14] CRC150795
[15] Being those that formed part of the JWS-Air

9.11 Also, I agree with the statement made by Commissioner van Voorthuysen, that often pumpable bores are not used to determine depth to groundwater due to the potential influence of drawdown.

10. OTHER MATTERS

Adaptive Management

10.1 During the course of the hearing, Commissioner McGarry asked whether an adaptive management approach would be suitable in this case. I understand that the basic premise of adaptive management allows the modification of mitigation measures based on the collection and analysis of monitoring data, creating a feedback loop to address effects.

10.2 I consider the adoption of an adaptive management approach in this case would be complex due the variability of climate (in reference to rainfall, windspeed and dryness of surfaces), and quarry operations proposed to be undertaken at the site. Given this, I consider it is appropriate for the focus to be based on the proposed staging approach and implementation of all 'reasonably practicable measures' to minimise the production of dust at the site.

Use of dust suppressants

10.3 The proposed use of chemical dust suppressant has been raised by submitters during the course of the hearing. As I understand it, the applicant proposes to use dust suppressants in accordance with condition (2) of Rule 5.18 of the CLWRP.

> *5.18* ***The discharge of a dust suppressant onto or into land in circumstances where a contaminant may enter water is a permitted activity, provided either of the following conditions is met:***
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> 1. *The discharge is only of vegetable oil, or of new light fuel or lubricating oil and is:*
>   a. *applied in a manner that does not result in pooling or runoff, with a maximum application rate not exceeding 2 litres/m^2 per day and 4 litres/m^2 per annum; and*
>   b. *not within 20 m of a surface water body, the Coastal Marine Area, a bore or soak-hole; or*
> 2. *The dust suppressant is approved under the Hazardous Substances and New Organisms Act 1996 and the use and discharge of the dust suppressant is in accordance with all conditions of the approval.*

10.4 Subject to the applicant meeting condition (2) of Rule 5.18, I consider the discharge of dust suppressant on to or into land is able to be undertaken as a permitted activity.

Internal CRC "policy" for dust monitoring within 500m of sensitive receptors

10.5 During the hearing there has been reference made to an internal CRC "policy" for dust monitoring at quarry boundaries that are within 500m of a sensitive receiving environment (a dwelling). As I understand it, this requirement was enforced by CRC following the results of the Yaldhurst Air Quality Programme which showed there was a dust nuisance resulting from quarries from time to time. The CRC consider that the monitoring is necessary to determine compliance with the requirement on most quarry consents to avoid offensive or objectional dust effects beyond the property boundary. It is not a policy that forms part of the CARP.

10.6 In this case, a site-specific assessment has determined on the basis of the activity that is proposed, it is only those within 250m that are likely to experience dust effects. However, I note the applicant has proposed, in the most recent set of draft conditions, to undertake PM_{10} monitoring where the active quarrying and cleanfilling area is less than 500m from an off-site sensitive location.

10.7 If the Panel have further questions in relation to the origin of the 500m separation distance in the context of the Yaldhurst Air Quality Program, Mr Firth is able to respond in writing.

11. DRAFT CONSENT CONDITIONS

11.1 In terms of consent conditions, I am generally comfortable that the consent conditions are appropriate to manage actual and potential adverse effects, I consider there is the ability to further refine some consent conditions to assist with the certainty and enforceability of conditions.

11.2 Ms Ryan has recommended some additional conditions be included on the air discharge permit, and I support the inclusion of such conditions.

12. CONCLUSION

12.1 Based on the information provided at this stage of the hearing, while I acknowledge the applicant could, in theory, comply with the restriction presented by Regulation 17(1), it is dependant on there being no error in the dust control measures employed.

12.2 I consider the adoption of additional conditions as recommended by Ms Ryan could assist in providing more certainty that activities at highest risk of causing a breach Regulation 17(1) will be managed with due care and caution. However, there are other matters which I consider are crucial for the Panel's determination on whether the applicant is able to undertake dust mitigation to the extent that is proposed, being access to sufficient quantities of water and the proposed methodology to supress dust outside of operating hours.

12.3 On this basis, I maintain my recommendation from my section 42A Report that the application should be refused as directed by Regulation 17(1).

Hannah Goslin
11 December 2019

CRC192414 – Water permit to use groundwater (new use)

New conditions

1) The volume of water used in terms of this permit from bore M36/0257 shall be taken in accordance with the conditions of CRC182422.

2) The volume used under this resource consent shall not exceed 119,920 cubic metres, less any volume of water used under resource consent alisCRC182422.

3) Water shall only be used for quarrying activities including:

   (a) dust suppression;
   (b) truck washing;
   (c) staff amenities; and
   (d) Irrigation of vegetated bunds and rehabilitated areas

   At 107 Dawsons Road and 220 Jones Road, Templeton, legally described as Rural Section 6475 and Rural Section 6324, Lot 1 Deposited Plan 4031, Rural Section 6342, Section 7 Survey Office Plan 510345, Rural Section 5381 and Section 6 Survey Office Plan 510345, at or about map reference NZTM2000 1555356mE, 5177132mN. As shown on Plan CRC192414A, attached to and forming part of this resource consent.

4) The consent holder shall before the first exercise of this consent:

   a.
      i. install a water meter(s) that has an international accreditation or equivalent New Zealand calibration endorsement, and has pulse output, suitable for use with an electronic recording device, which will measure the rate and the volume of water used to within an accuracy of plus or minus five percent as part of the pump outlet plumbing, or within the mainline distribution system, at a location(s) that will ensure the total volume of water used is measured; and
      ii. install a tamper-proof electronic recording device such as a data logger(s) that shall time stamp a pulse from the flow meter at least once every 60 minutes, and have the capacity to hold at least one season's data of water taken as specified in clauses (b)(i) and (b)(ii), or which is telemetered, as specified in clause (b)(iii).

   b. The recording device(s) shall:
      i. be set to wrap the data from the measuring device(s) such that the oldest data will be automatically overwritten by the newest data (i.e. cyclic recording); and
      ii. store the entire season's data in each 12 month period from 1 July to 30 June in the following year, which the consent holder shall then download and store in a commonly used format and provide to the Canterbury Regional Council upon request in a form and to a standard specified in writing by the Canterbury Regional Council; and
      iii. shall be connected to a telemetry system which collects and stores all of the data continuously with an independent network provider who will make that data available in a commonly used format at all times to the Canterbury Regional Council and the consent holder. No data in the recording device(s) shall be deliberately changed or deleted.

   c. The water meter and recording device(s) shall be accessible to the Canterbury Regional Council at all times for inspection and/or data retrieval.

   d. The water meter and recording device(s) shall be installed and maintained throughout the duration of the consent in accordance with the manufacturer's instructions.

e. All practicable measures shall be taken to ensure that the water meter and recording device(s) are fully functional at all times.

5) Within one month of the installation of the measuring or recording device(s), or any subsequent replacement measuring or recording device(s), and at five-yearly intervals thereafter, and at any time when requested by the Canterbury Regional Council, the consent holder shall provide a certificate to the Canterbury Regional Council, Attention Regional Leader - Monitoring and Compliance, signed by a suitably qualified person certifying, and demonstrating by means of a clear diagram, that:

a. The measuring and recording device(s) have been installed in accordance with the manufacturer's specifications; and
b. Data from the recording device(s) can be readily accessed and/or retrieved in accordance with clauses (b) and (c) of condition (4).

6) The Canterbury Regional Council, Attention: Regional Leader – Monitoring and Compliance, shall be informed within five days of first exercise of this consent by the consent holder.

7) The Canterbury Regional Council may, once per year, on any of the last five working days of May or November, serve notice of its intention to review the conditions of the consent for the purpose of:

a) Dealing 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

b) Requiring the adopting of the best practicable option to remove or reduce any adverse effect on the environment.

WYNNWILLIAMS

MEMORANDUM

Date: 5 December 2019

To: Section 42A officers, Environment Canterbury

From: Lucy de Latour, Kate Woods

ADVICE ON THE ENFORCEABILITY OF RESOURCE CONSENT CONDITIONS FOLLOWING EXPIRY OF RESOURCE CONSENT

Introduction

1. The Canterbury Regional Council (**Council**) is currently processing a resource consent application relating to a proposed new quarry in Templeton to be operated by Fulton Hogan Limited (**FHL**). One question that has been raised by the Hearing Commissioners at the hearing is whether resource consent conditions concerning rehabilitation can endure following the expiry of the relevant resource consents.

2. Accordingly, you have asked for our legal opinion on whether resource consent conditions concerning rehabilitation can endure following the expiry of the resource consent. It is intended that this advice will be provided to the Hearing Commissioners as part of the Council officer's s42A reporting on the application.

3. We have also considered whether monitoring conditions can endure following the expiry of the resource consent given that often monitoring will be required during and following rehabilitation.

Executive summary

4. In our opinion, resource consent conditions, including those which concern rehabilitation and monitoring, can endure following the expiry of the resource consent provided:

    a. the conditions are clearly framed and are intended to be complied with at the end of or after the consented activity; and

    b. the conditions do not necessitate work that would otherwise require a resource consent.

5. However, there is limited case law that supports the view that conditions can endure following the expiry of the resource consent. The case law authority supporting this approach has only arisen in the Environment Court context and therefore is not binding authority. This means there is a risk of the Court finding differently if this matter were challenged. There is also a risk that certain elements of the rehabilitation requirements may require resource consent.

6. Given these risks, it may be appropriate for the conditions requiring the rehabilitation of the site, and any monitoring following the rehabilitation of the site, be completed prior to the expiry of the resource consent. This would ensure that any uncertainty concerning the enforceability of the conditions do not impact the successful rehabilitation of the site.

7. Ultimately, if the hearing commissioners are minded to grant the application sought by FHL, this will be a matter for them to determine in making their decision on the application (including the appropriateness and validity of any conditions).

8. Our detailed advice follows.

Advice

9. The starting point for determining the validity of a resource consent condition is sections 108 and 108AA of the Resource Management Act 1991 (**RMA**).

10. Section 108 provides a consent authority with a very broad and general power to impose conditions on resource consents provided the conditions are appropriate. Section 108(2) provides a non-exhaustive list of conditions that can be imposed including:

    a. Conditions requiring works be provided, including the replanting of any vegetation or the restoration of any natural or physical resource;[1] and

    b. Conditions requiring the consent holder to carry out measurements, samples, analyses or other specified tests and provide information to the consent authority in a specified manner and at specified times.[2]

11. Case law has established that resource consent conditions must meet the following criteria to be valid under section 108 of the RMA:[3]

    a. The conditions must be for a resource management purpose, rather than an ulterior purpose;

    b. The conditions must fairly and reasonably relate to the development authorised by the consent to which the condition is attached; and

    c. The conditions must not be so unreasonable that a reasonable consent authority, duly appreciating its statutory duties, could not have approved it.

12. Section 108AA of the RMA provides further limitations to the types of resource consent conditions that can be imposed by consent authorities. Section 108AA provides:

> (1) A consent authority must not include a condition in a resource consent for an activity unless-
>
> (a) the applicant for the resource consent agrees to the condition; or
>
> (b) the condition is directly connected to 1 or both of the following:
>
> (i) an adverse effect of the activity on the environment:
>
> (ii) an applicable district or regional rule, or a national environmental standard; or
>
> (c) the condition relates to administrative matters that are essential for the efficient implementation of the relevant resource consent.

13. We do not consider there is anything in sections 108 or 108AA, or in the general scheme of the Act, that explicitly prevents a condition from being able to endure

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1 Section 108(2)(c).

2 Section 108(4).

3 See *Newbury District Council v Secretary of State for the Environment* [1981] AC 78; *Waitakere City Council v Estate Homes Ltd* [2006] NZSC 112; *Cookie Munchers Charitable Trust v Christchurch City Council* W090/08 [2008] NZEnvC 363.

beyond the expiry of the resource consent if it is a lawful and validly imposed condition.

14. Notably, in relation to the surrender of a resource consent, the Act anticipates work under a consent can be completed following the surrender of a consent. Section 138(3) provides:

> (3) A person who surrenders a resource consent remains liable under this Act-
>
> (a) ….
>
> (b) to complete any work to give effect to the consent unless the consent authority directs otherwise...

15. In *Auckland City Council v Easton*[4], the Environment Court found that where the consent has been operated under and upon, one cannot avoid complying with conditions simply by the subsequent surrender of that consent.[5]

16. We consider a consistent approach can be applied to any conditions following the expiry of a consent. If consent conditions cannot be enforced beyond the term of the resource consent, consent holders could avoid compliance with those conditions by electing not to undertake the required work during the term of the resource consent. In our opinion, such an interpretation would undermine the basis upon which the consent was granted and operate against the principle of sustainable management.

17. There is limited case law on the question of whether conditions can endure beyond the expiry of a resource consent. However, there is Environment Court authority that supports the view that conditions can endure following the expiry of the resource consent.

18. Relevantly to the present circumstances, the Environment Court in *Bay of Plenty Regional Council v Waaka* found that a condition requiring the rehabilitation and covering of a landfill site endured, and could be enforced, following the expiry of the consent.[6] The Court stated:

> [24] Accordingly, the consent conditions may also contemplate steps beyond the consent itself may be required which are enforceable outside the consent. Although there does not appear to be any direct authority on the point, I have concluded clearly that continuing conditions of a consent are not avoided by the surrender or expiry of the consent.
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> …
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> [26] I have concluded that this also applies to the expiry of a consent under Section 125 of the Act. This of course will turn on whether the condition is intended to enure or expire with the consent. The rehabilitation of the site in this case is clearly a condition that is intended to take effect at the end of or after the operation consented to. To suggest that a consent holder could avoid that condition simply by not undertaking the work during the term of the consent would in my view be to undermine the basis of the consent itself.

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4 *Auckland City Council v Easton* A075/2009 [2009] NZEnvC 208.

5 *Auckland City Council v Easton* A075/2009 [2009] NZEnvC 208 at [56].

6 *Bay of Plenty Regional Council v Waaka* A080/09 [2009] NZEnvC 223.

19. The decision in *Waaka* was subsequently cited with approval by the Environment Court in *Re Rodney District Council*:[7]

> [38] There are even conditions of consents that might be seen to require fulfilment after the expiry of the consent itself. In *Bay of Plenty Regional Council v Waaka* the Court concluded that a consent requiring the rehabilitation and covering of a fill site continued in force even after the consent itself had expired through the effluxion of time.
>
> (Citation emitted).

20. However, we consider there are limits to the types of conditions that can endure following the expiry of a resource consent.

21. First, the conditions will need to be clearly framed and intended to be complied with at the end of or after the consented activity, rather than just while the consented activity is being undertaken. This is in contrast to a condition that has been drafted to require ongoing monitoring while the consented activity is continuing. Once a consent has expired, and the consented activity ceased, then the requirement to comply with those continuing conditions will fall away.

22. Secondly, the conditions cannot necessitate work that would otherwise require a resource consent. Once a consent has expired, the consent holder will no longer be able to undertake the consented activity (unless the consent holder has obtained a replacement resource consent, or the activity is otherwise compliant sections 9-15 of the RMA). In other words, compliance with the conditions cannot otherwise permit an activity that does not have all the necessary resource consents.

23. In the case of rehabilitation conditions, we consider the conditions will only be able to endure if the activities associated with rehabilitation (including the reshaping the relevant areas, spreading of topsoil, and re-grassing) are able to be undertaken without a resource consent.

Monitoring conditions

24. We have also considered whether monitoring conditions can endure following the expiry of the resource consent given that it is possible for monitoring conditions to continue following rehabilitation. We are not aware of any case law which specifically deals with the enforceability of monitoring conditions beyond the term of the resource consent. In our opinion, whether a monitoring condition can endure following the expiry of a resource consent turns on how the condition is drafted and whether the monitoring is intended to be complied with at the end of or after the consented activity.

25. In *Waaka*, the Environment Court considered, without concluding, that an ongoing obligation for stormwater and leachate monitoring beyond the expiry of the consent would be problematic where the consent holder had fulfilled all conditions of the consent.[8] As outlined above, we consider that if a condition has been drafted to require ongoing monitoring but only while the consented activity is continuing, it is unlikely that is intended to be complied following the completion of the consented activity (and once consent has expired). Further, it would impose an unreasonable burden on the consent holder to require indefinite monitoring of the site where no expiry date for the monitoring condition is provided. As such, we consider that

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7 *Re Rodney District Council* [2010] NZEnvC 85 at [38].

8 *Bay of Plenty Regional Council v Waaka* A080/09 [2009] NZEnvC 223 at [33].

monitoring conditions will generally expire with the resource consent, unless an alternative intention is clear.

26. However, in our opinion, where monitoring conditions are intended to be complied with after the consented activity is completed for a specified time period, it is possible for those conditions to also continue beyond expiry of the consent. We consider that the condition proposed in the section 42A report requiring monitoring and maintenance of the rehabilitated grassland area for a period of 24 months following the completion of rehabilitation[9] is an example of such a condition. Conditions requiring groundwater monitoring to continue for a five years following the completion of backfilling would also be an example of conditions that could endure beyond the expiry of the consent (i.e. if backfilling was only completed just before the expiry of consent).

Conclusion

27. In our opinion, resource consent conditions requiring rehabilitation and monitoring can endure beyond the expiry of the resource consent. However, any condition will need to be drafted carefully to convey a clear intent it is to be complied with at the end of or after the consented activity, not just while the consented activity is being undertaken. Further, the compliance with the condition cannot necessitate work that would otherwise require a resource consent.

28. However, the case law specifically supporting this approach has only arisen in the Environment Court context and therefore is not binding authority. This means there is a risk of the Court finding differently if this matter were challenged. There is also a risk that certain elements of the rehabilitation requirements may require resource consent.

29. Given these risks, it may be appropriate for the conditions requiring the rehabilitation of the site, and any monitoring following the rehabilitation of the site, be completed prior to the expiry of the resource consent. While this approach would provide a shorter window for FHL to utilise their consents, it would avoid any risk that conditions cannot be enforced beyond the expiry of the consent.

30. Ultimately, if the hearing commissioners are minded to grant the application sought by FHL, this will be a matter for them to determine in making their decision on the application (including the appropriateness and validity of any conditions).

Wynn Williams

[9] Hannah Goslin, *Section 42A Officer's Report*, Appendix 7, draft condition 28.