

Memo

To: Alison Brown
From: Joshua Leckie / Annabel Linterman **Date:** 8 November 2019
Client: Bathurst Coal Limited **Matter Number:** BAT99833

**Subject: Canterbury Coal Mine – Consented Baseline for
 Regional Consents**

Introduction and Summary

1. This memorandum sets out our legal analysis of the “consented baseline” authorised by the regional consents held by Bathurst Coal Limited (**BCL**) for discharges to water and land from the Canterbury Coal Mine (**CCM**).
2. This memorandum responds to the assessment of the consented baseline in the memorandum prepared by Adele Dawson, Consultant Consents Planner for Environment Canterbury, dated 14 October 2019.
3. In summary, we disagree with the extent of the consented baseline described by Ms Dawson. We consider that Ms Dawson has focused unduly narrowly on the geographical footprint of the mining pits (i.e. the location of the extraction of coal). In our view, the consented baseline must be determined with reference to the quality and quantity of discharges authorised by the consents, along with the legal descriptions of the land to which the consents and their conditions apply.
4. We record that the legal interpretation set out in this memorandum applies to the other regional consents held by BCL for the CCM. We have focused this memorandum on the consents for discharges of contaminants to water and land, as this was the focus of Ms Dawson’s memorandum for Environment Canterbury.

The Law

5. In order to determine the consented baseline, the scope of the existing CCM regional consents must be ascertained. The law on the scope of an activity authorised by a consent is well established. The scope of an activity is governed by the terms of the application under which consent was sought for the activity.¹
6. A consent authority cannot grant consent for more than what was sought in an application. The application (including the assessment of effects, any technical reports, plans or other related documents) can be considered after the grant of consent to determine the accurate scope of the consent.² Whether an activity is within the scope of a consent depends on whether the scale, intensity and effects of the activity are significantly different from what was originally applied for.³
7. In terms of the law, we also emphasise the nature of regional consents. Regional consent triggers arise as a result of regional rules in a regional plan. The Resource Management Act 1991 (**RMA**) states that the purpose of regional plans is to assist regional councils to carry out their functions.⁴ Their functions are set out in section 30 and include, relevantly, controlling

¹ *Sutton v Moule* (1992) 2 NZRMA 41, *Clevedon Protection Society Inc v Warren Fowler Ltd* (1997) 3 ELRNZ 169, cited in *Millar v Ashburton District Council* [2016] NZHC 3015 at [71].

² *Clevedon Protection Society Inc v Warren Fowler Ltd*, above n 1.

³ *Atkins v Napier City Council* [2009] NZRMA 429 (HC).

⁴ Section 63.

the use of land to maintain and enhance the quality of water and to maintain the quantity of water.

8. The reason we emphasise the RMA provisions relating to regional council functions is because these functions are of a different nature to territorial authority functions under section 31 of the RMA and, correspondingly, the purpose of district plans under section 72. This distinction is important when considering the consented baseline for the CCM regional consents (which result from regional council functions), compared to the consented baseline for the CCM land use consents granted by the Selwyn District Council (**SDC**) (which result from territorial authority functions).

Analysis of Scope of Applications and Consented Baseline

9. To determine the consented baseline for the CCM regional consents, we have reviewed the relevant applications and decision documents for the regional consents.
10. We consider that Ms Dawson has accurately set out the history of the CCM regional consents. However, there are several aspects of the analysis in her memorandum that we disagree with and consider need to be clarified. These are addressed in the following sections.

Reliance on 2009 Discharge Consents

11. Ms Dawson has relied heavily on the applications for the original discharge consents, CRC991437, discharge of treated mine water into the Tara Stream, granted on 17 February 2009, and CRC081869, discharge of coal ash, lime products and mussel shells to land, also granted on 17 February 2009. As we understand it, Ms Dawson's position is that these applications limit the scope of the regional consents to the geographical footprint of the four original mining pits.
12. CRC991437 and CRC081869 are not the current discharge permits for the CCM. They were surrendered and replaced by CRC170540 and CRC170541 in January 2017 and February 2017, respectively. Legally, CRC170540 and CRC170541 are stand-alone consents and contain conditions that stipulate that they shall not be exercised concurrently with the previous consents CRC991437 and CRC081869.⁵
13. Accordingly, reading CRC170540 and CRC170541 in conjunction with CRC991437 and CRC081869 to limit the scope of the consented baseline is, in our view, an incorrect approach.

Nature of Regional Consents

14. Ms Dawson does not appear to have taken proper account of the nature of regional consenting matters. The nature of regional consents (as outlined above) is such that the activities they enable cannot be interpreted solely by geographical areas (i.e. in this case, the location of the mining pits). While the broader site area is relevant to determining the scope of an activity, equally, if not more important, are the other elements and qualifiers of regional consents.
15. In the current context, where the subject consents relate to discharges of contaminants to water and land, the other relevant elements and qualifiers include the:
 - (a) treatment techniques and resulting quality of the discharges;
 - (b) volume or quantity of the discharges; and

⁵ Condition 5 of CRC170540 and Condition 4 of CRC170541.

- (c) location of the discharges (i.e. into which water body, or onto which area of land).

Focus on Geographical Footprints of Mine Pits

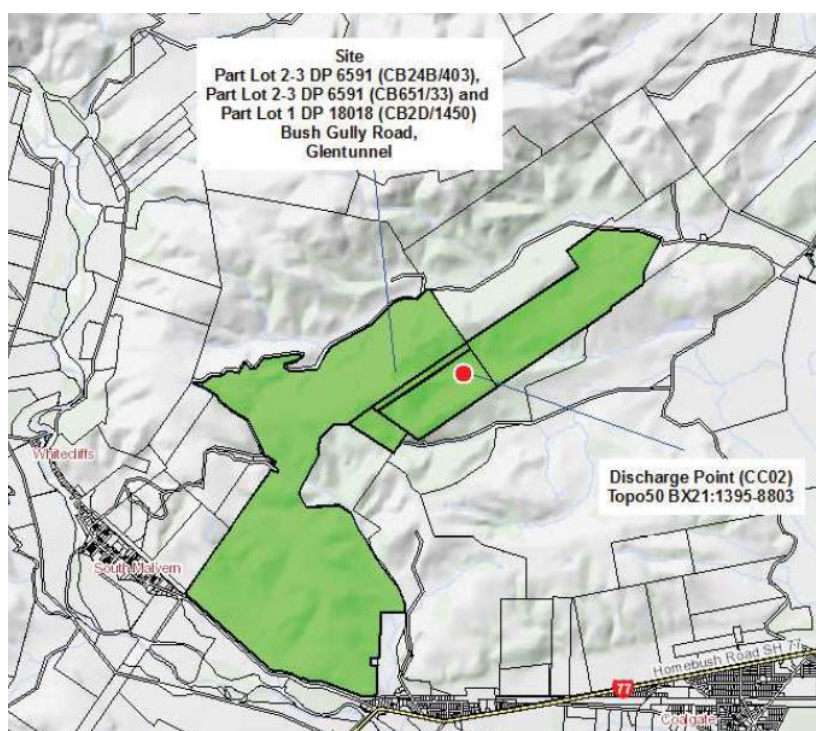
16. Ms Dawson has focused largely on the geographical footprints of the mine pits contained in the earlier (CRC991437 and CRC081869) application documents in determining the scope of the consents.
17. For land use consents, the geographical area is relevant to the determination of the consented baseline. Indeed, the mining pit footprints were a primary focus when the consented baseline was agreed between SDC and BCL for the CCM land use consents. That reflects the nature of territorial authority functions, the purpose and contents of district plans and land use consents granted under those plans.
18. We do not consider that Environment Canterbury's assessment of the scope of the regional consents should focus solely on geographical footprints contained in the earlier applications. Given regional council functions and the purpose of regional plans, we consider the focus should be on the quality and quantity of the discharge and the location at which the discharge is entering water or land, along with the general site context (i.e. the broader site boundaries).

Application for CRC170540 and CRC170541 and Consent Conditions

19. Ms Dawson has identified at several points in the memorandum (paragraphs 11 and 17) that the application for CRC170540 and CRC170541 did not include maps identifying the footprints of the four mine pits. The application instead relied on a list of the land parcels that make up the entire CCM operation.
20. In our view, the reason for this is because the discharges to water and land that are authorised by CRC170540 and CRC170541 are not tied to the precise mining pit footprints. Rather, these consents relate to the quality and quantity of the discharges and the point at which the discharges will enter water or land within the broader listed land parcels.
21. This is clear from a review of the application for CRC170540 and CRC170541. The application assessed the generation and management of the effects of the proposed discharges, rather than their spatial extent. Specifically, the application addressed the:
- (a) geochemical characteristics of the discharges;
 - (b) appropriateness of treatment by way of sedimentation ponds;
 - (c) volume of the discharges;
 - (d) impacts on the water quality of the Tara Stream; and
 - (e) proposed management and monitoring programmes.
22. This is also illustrated by the conditions of CRC170540 and CRC170541, which impose limits relating to quality and quantity of discharges.⁶ The conditions expressly refer to the list of land parcels that make up the entire CCM operation and state that discharges may only occur from those land parcels.⁷ There is nothing in the conditions that limits the discharges to the mine pit footprints. The plans attached to the consents indicate that the consents apply to the whole CCM site. Further, the plan for the consent relating to the Tara Stream discharge, which is reproduced below, shows the discharge point into Tara Stream.

⁶ See for example Conditions 1 and 3 of both consents under the heading, "Limits".

⁷ See Conditions 2 of both consents.



23. In our view, the above examples explain why the application was granted by Environment Canterbury at that time without requiring specific detail of the mining pits.

Discharge Consent CRC173823

24. BCL holds an additional regional consent, CRC173823, which authorises the discharge of contaminants into the Bush Gully Stream. This is a different discharge location to CRC170451. The application and decision on CRC173823 (including the conditions) also serve to illustrate that it is the quality and quantity of the discharges, in the context of the wider application site, that determine the scope of a regional consent.

BCL's Current Variation Application CRC191342

25. BCL has an application currently in progress, CRC191342. This application seeks to vary CRC170541 to add additional legal descriptions of two land parcels that were (in BCL's view) inadvertently missed off when CRC170541 was granted.
26. In this instance Environment Canterbury has accepted the legal descriptions of the two land parcels as forming the scope of the current variation application. The approach taken in Ms Dawson's memorandum, which does not place any weight on reference to land parcels, is inconsistent with Environment Canterbury's position on the variation application.
27. The approach in the memorandum is also inconsistent with the approach taken by Environment Canterbury over the years in its role reviewing monitoring reports prepared by BCL in accordance with the existing regional consent conditions.

Conclusion on Consented Baseline

28. For the reasons set out above, it is our view that the consented baseline for the regional consents held by BCL relates to the geographical area of "mining activities" only to the extent of the legal land descriptions, and is not limited to the areas shown in Figure 4 in Ms Dawson's memorandum.

29. We consider that the consented baseline for the regional consents needs to be established by what is actually enabled by those consents. This incorporates discharges from all of the land parcels listed in CRC170540 and CRC170541, at the consented discharge points, to the extent they comply with the quantity and quality limits set by those consents.