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Attention: Janette Dovey
Bellbird Consulting Group Limited
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Dear Janette

Canterbury Coal Mine (RC185622/RC185640)

1. We refer to your letter dated 13 December 2018 requesting further information (**RFI**) on the above resource consent applications (**Applications**).
2. This letter addresses legal aspects of the information requested in the RFI. This letter is to be read in conjunction with the bundle of reports and responses provided with our letter.

Road Sealing

3. Bathurst is committed to the sealing of the preferred route at considerable cost to the company. This will have positive effects for the community and users of the road network.
4. Bathurst has been in going discussions with Selwyn District Council (**SDC**) on a practical way to implement Bathurst's offer of paying for the reasonable costs of sealing the preferred route given the SDC's role as the road controlling authority.
5. Relevant to the Applications however, an Interim Dust Suppression Management Plan is proposed and expanded on in more detail below to mitigate effects until that sealing takes place.
6. This can give SDC comfort that the relevant Resource Management Act 1991 (**RMA**) effects have been appropriately mitigated, whether through sealing or dust suppression. .

Traffic Management Plan

"8. Proposed Condition 8(d) refers to a traffic management plan. Please provide the traffic management plan, or, as a minimum, please provide a template report or a proposed condition setting out the key elements to be included in the proposed traffic management plan."

7. The use of management plans is a form of adaptive management, which strikes a balance between a decision-maker being satisfied that effects of a development can be appropriately avoided, remedied or mitigated while at the same time giving consent holders flexibility to determine at a later date how they do that.
8. Case law has established that, in allowing this flexibility, the key overarching requirement is that management plans must operate in a way that will serve the purpose of the RMA.¹

¹ *Crest Energy Kaipara Ltd v Northland Regional Council* EnvC Auckland A132/09, 22 December 2009 at [229] (*Crest Energy Kaipara Ltd*)

9. In particular, the Court has stated that the conditions which provide for the use of management plans must include clear, reasonably certain and enforceable objectives² and that conditions should contain quantifiable standards and performance criteria against which management plans can be assessed.³
10. We consider the below condition (or words to this effect) meets those criteria in that it is clear, and contains certain and enforceable objectives:

The consent holder must:

- a. *Within 6 months from the commencement of this consent submit to Selwyn District Council's Road Corridor Engineer, a Traffic Dust Suppression Management Plan (TDSMP) prepared by an appropriately qualified Site Traffic Management Supervisor (STMS for approval). The objective of the TMP is to reduce dust caused by vehicles associated with the Canterbury Coal Mine until the sealing of the Preferred Route. The TMP must specifically provide for and/or directly address the following requirements as a minimum:*
- (i) Identification of a procedure to ensure arrival and departure times of heavy vehicles are staggered.*
 - (ii) operate a water cart along Bush Gully Road to reduce dust effects and undertake any other practicable dust suppression measures to mitigate dust effects at the sites of existing dwellings which are located within 50 metres of the Preferred Route and for a distance of at least 100 metres on either side of those dwellings.*
 - (iii) stagger their arrival into and departure from the Canterbury coal mine with a view to reducing dust effects;*
 - (iv) ensure that Heavy Vehicles do not exceed a speed limit of 40km per hour on the Preferred Route.*
- b. *submit a copy of the approved TMP to Selwyn District Council's Manager Resource Management Engineering; and*
- c. *ensure implementation of the approved TMP at all times until the Preferred Route is sealed.*
- d. *monitor the performance of the methods proposed in the TDSMP and vary the TDSMP annually to respond to the results of such monitoring. The updated Dust Management Plan shall be submitted to the Selwyn District Council for approval, within 20 working days of receipt, on each anniversary of the grant of this consent*

Solid Waste

"32. Another interpretation might be that the CCR is waste that is disposed of into land; notwithstanding that this is of benefit to mine drainage. The interpretation would have implications as to the status of the activity, i.e. whether it is discretionary, as applied for, or non-complying, as could be the case under a differing interpretation."

11. Rule 8.1.1 in the District Plan captures "any activity which involves the generation, storage or disposal of solid waste".

² *Crest Energy Kaipara Ltd* at [227]; *Groome v West Coast Regional Council* [2010] NZEnvC 399 at [14]

³ *Final Report and Decision of the Board of Inquiry into the Transmission Gully Proposal* Board of Inquiry, EPA 0175, June 2012 at [187] (the *Transmission Gully* decision)

12. 'Disposal' is defined in the District Plan as including *"any activity associated with the permanent discarding of material which is spent, worthless or in excess."*
13. 'Solid Waste' is defined in the District Plan as including *"any material which is discarded as being spent, useless, worthless or in excess, and includes liquid or gaseous waste which is stored in containers."*
14. The Oxford Dictionary provides the following definitions for "spent", "useless", "worthless" and "in excess":
 - (a) "Spent": Having been used and unable to be used again.
 - (b) "Useless": Not fulfilling or not expected to achieve the intended purpose or desired outcome.
 - (c) "Worthless": Having no real value or use.
 - (d) "In excess": Exceeding the proper amount or degree.
15. As was set out in the Application, Bathurst Coal Limited (**BCL**) uses ash or CCRs in its ELF's to neutralise acidic rock (and as a consequence to reduce AMD and the quantities of AMD requiring treatment). This is due to the qualities of the ash and CCR's and the role they play in the treatment of mine drainage.
16. On a strict interpretation therefore ash does not come within the definitions of 'solid waste' or 'disposal' as it is not 'spent, useless or worthless' on the common interpretation of those words rather it is a valued and useful by-product which is being reused by BCL.
17. This interpretation is also consistent with the text surrounding Rule 8.1.1 which statutory interpretation requires be used as a guide to interpreting the rule. This wording shows a consistent theme that Rule 8.1.1 is intended to relate to landfills and private waste dumps. For example:
 - (a) Note 1 in the Chapter refers to "landfills";
 - (b) Note 3 refers to offal pits;
 - (c) Note 7 refers to wheelie bins;
 - (d) Rule 8.1.1.3(a) refers to public collection service for solid waste (as does the reasons for the rules) ;
 - (e) Rule 8.1.7 refers to landfill and "use of land or facilities to dispose of solid waste".

Hazardous Substances

18. Linked to our advice above regarding Solid Waste, we have also considered whether the use of ash or CCRs in the ELF's to neutralise acidic rock triggers the Solid Waste rule due to it being or becoming a Hazardous Substance as defined in the Hazardous Substances and New Organisms Act 1996. In that act:

hazardous substance means, unless expressly provided otherwise by regulations or an EPA notice, any substance—

- (a) with 1 or more of the following intrinsic properties:
 - (i) explosiveness:
 - (ii) flammability:
 - (iii) a capacity to oxidise:

(iv) corrosiveness:

(v) toxicity (including chronic toxicity):

(vi) ecotoxicity, with or without bioaccumulation; or

(b) which on contact with air or water (other than air or water where the temperature or pressure has been artificially increased or decreased) generates a substance with any 1 or more of the properties specified in paragraph (a)

19. Bathurst holds an Environment Canterbury resource consent for the use of ash, lime products and mussel shells (CRC170540). The application for this consent thoroughly examined the qualities of the ash, lime products and mussel shells and the resulting resource consent conditions prescriptively set out in detail the method for the use of the those products to respond to that.
20. We are advised that the material does not trigger the intrinsic qualities listed in (a) above. The focus is then on (b) which adds a further step to the assessment relating to the impact of adding air or water to the ash, lime products and mussel shells. This therefore requires an assessment of the controls on the use of the ash at which point it may become in contact with (in this instance relevantly) water. This consideration is different to the qualities in (a) which trigger the definition of hazardous substance independent of how that substance is applied to land (and exposed to water).
21. We are advised that the monitoring demonstrates that the relevant material only triggers the properties listed in (a) when coming in to contact with water if it is exposed in its raw form. The conditions of CRC170540 ensure this is not the case. In particular, the ash, lime products and mussel shells is required to be spread thinly and mixed with overburden during the application (with a cap of 1 metre). This process creates an acid neutralising layer that avoids the triggering of any of the intrinsic qualities listed in the definition of a hazardous substance and the Class B Landfill criteria – Hazardous Waste Guidelines are met (with mixing at a 1:4 ratio and 1 metre minimum capping).
22. CRC170540 was provided in the Application documentation.

Activity Status

“33. The proposal does not comply with this rule (Rule 9.21.1.4); however, non-compliance with Rule 9.21.1.4 in particular is listed as both a discretionary and a non-complying activity (under Rules 9.21.3 and 9.21.4). Given that the activity is both discretionary and non-complying under these rules, the more restrictive status is applied and this proposal becomes a non-complying activity.”

23. We consider there is an error in the District Plan. We do not consider that the District Plan drafters intended for the same rule to have two activity statuses.
24. We therefore do not consider it is appropriate to assume that the non-complying activity status should apply as this is not the usual bundling situation where the most restrictive activity status approach is taken. Such an approach is only standard procedure where one activity triggers two different rules with two different activity status.
25. We recommend progressing a solution to the error with the Council. For example the Council using its power under clause 20A of Schedule 1 of the RMA to correct the error, once it has been determined what the correct activity status for a non compliance with Rule 9.21.1.4 is. Determining this would be assisted by reference to any evidence and decision from when the rule was being considered by decision makers prior to being made operative.

Assessment of Ecological Effects

26. The RFI sought several ecological assessments be undertaken. Boffa Miskell has provided a thorough assessment that is provided.

27. While we agree that the SDC has a role in relation to biological diversity in the District Plan, we consider that it is important that in doing so, the jurisdiction of Environment Canterbury is not intruded upon. Any condition relating to Environment Canterbury's jurisdiction would be ultra virus.
28. Section 30 of the RMA is very clear in its allocation of responsibility for the discharge of contaminants and water quality and quantity. It is not appropriate for SDC to seek to control those effects. Given biological diversity is intrinsically linked to water quality we consider SDC can take comfort and rely on Environment Canterbury's conditions of consent to manage ecological effects. This is further assessed in the assessment prepared by Boffa Miskell.

Conclusion

29. Please contact us if you want to engage on the content of our advice.

Yours faithfully
Lane Neave



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