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Horizons Regional Council

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Fonterra discharge application

- 1 We act for Fonterra Limited (*Fonterra*).
- 2 This letter is intended to accompany the resource consent application for the renewal of discharge permit APP-2003010585.02 (to discharge treated wastewater to the Manawatū River).
- 3 As a part of the renewal process, Fonterra is proposing to make further improvements to its separate land-based wastewater treatment system. The wastewater management system will only be able to be finalised at the time the outcome of the river consenting is known, with a number of other consents being required to give effect to further wastewater treatment infrastructure – including, most relevantly, a proposed storage facility. The wider wastewater treatment system will also rely on a separate land-based discharge consent which is already held and does not form part of this process.
- 4 For the reasons set out in this letter, we consider that the proposed approach to seeking consents on a staged basis is necessary, and consistent with the Resource Management Act 1991 (*RMA*), and a deferral to apply for further consents would not be appropriate.
- 5 This letter sets out the legal position and then references it to the Fonterra discharge proposal.

The legal position

- 6 Most decisions that relate to the staging of resource consents generally refer to the starting point described in the *Affco* decision which states:¹

*“Good resource management practice requires that **in general** all resource consents required should be carefully identified from the outset and that application is made so that they can be considered together jointly.”*

[Emphasis added]

- 7 The above statement was made by the Planning Tribunal in the context of a decision shortly after the RMA had been enacted and was pitched as a general statement to applicants and councils. That statement therefore needs to be read as a generalisation rather than an absolute requirement.

¹ *Affco New Zealand Ltd v Far North District Council (No 2)* (1994) NZRMA 224 (Planning Tribunal decision)



- 8 It is clear that the above statement is not a formal requirement of the RMA. In short, there is no provision in the RMA that precludes an applicant from making applications for resource consents at separate times, notwithstanding the fact that they may relate to the same overall project. The RMA implicitly recognises in section 91(1) that an application may be made for some resource consents required in respect of a project but not others.
- 9 It is precisely for the reason that applicants have the option of applying for consents at separate times that Parliament has given consent authorities a discretion under section 91 of the RMA to defer notification or hearing of applications where other resource consents are required. Section 91 provides:

91. Deferral pending application for additional consents—

- (1) A consent authority may determine not to proceed with the notification or hearing of an application for a resource consent if it considers on reasonable grounds that—
- (a) other resource consents under this Act will also be required in respect of the **proposal to** which the application relates; **and**
- (b) it is appropriate, for the purpose of better **understanding the nature of the proposal**, that applications for any one or more of those other resource consents be made before proceeding further.
- (2) Where a consent authority makes a determination under subsection (1), it shall forthwith notify the applicant of the determination.
- (3) The applicant may apply to the Environment Court for an order directing that any determination under this section be revoked.

[Emphasis added]

- 10 Accordingly, the ability to exercise the discretion in section 91(1) is limited to those situations where the council first determines that applications for other consents are required for enabling the relevant consent authorities to "better understand" the "nature of the proposal".²
- 11 The phrase "nature of the proposal" has been analysed by the Court in *Waitakere Forestry Park Ltd v Waitakere City Council*.³ The Court pointed to the Concise Oxford Dictionary's definition (9th Edition) of "nature" as "(relevantly) meaning 'a thing's innate or essential qualities or character'". The comment was then offered that "(t)he insertion of the word 'nature' only serves to emphasise the concentration in s.91(1)(b) on the essential qualities of the proposal". In the light of that perceived "concentration", the Court proceeded to observe (237):

So at first sight s 91(1)(b) supplies a restricted test on which a council may base a deferral. Bearing in mind that most applications to which s 91 will apply must be accompanied by an assessment of environmental effects under the Fourth Schedule [s

² *Waitakere Forestry Park Ltd v Waitakere City Council* [1997] NZRMA 231

³ [1997] NZRMA 231



89(4)(b) and s 89(6)], it is relatively infrequently that applications for other resource consents will be necessary to understand the essential qualities of any proposal.

12 That passage was followed by a rider:

On reflection, and considering the scheme of Part VI as set out in para 3.1, and the "effects-based" nature of the Act as a whole, we consider that the words in s 91(1)(b) have not been used with quite the care that is necessary for clarity, and the prima facie restricted interpretation of s 91 is not correct. Section 91(1)(b) refers to "the nature of the proposal" rather than "the nature of the activity". By contrast s 92 which deals with postponements when further information is required, contains a stipulation that:

- (4) *Further information may be required...only if the information is necessary to enable the consent authority to better understand the nature of the activity in respect of which the application for a resource consent is made, and the effect it will have on the environment... (our emphasis)*

We find that the word "proposal" is a global term and means; "the activity which is intended by the applicants, and the effects of the activity". The important word in s 91(1)(b) is "proposal" rather than "nature".

In summary, while there are indications in s 91(1)(b) that the test is to be a narrow one, there are contra-indications being:

- the use of the word "proposal";*
- the scheme of Part VI; and*
- the "control of effects" thrust of the legislation.*

*All these suggest that the second limb of s 91(1) is designed to allow a consent authority to defer a hearing of application if a further consent will give a better understanding of **the proposed activity and its effects, these together comprising, the "proposal"**.*

13 *Waitakere Forestry Park was endorsed by Randerson J in Waitakere City Council v Kitewaho Bush Reserve Company Ltd and others.*⁴ At [26] His Honour had this to say:

I have been assisted by the thorough examination of the approach to s 91 by the Environment Court (presided over by Judge Jackson) in Waitakere Forest Park Ltd v Waitakere City Council [1997] NZRMA 231. The position may be summarised as follows:

- a) A consent authority may determine not to proceed with the notification or hearing of an application for a resource consent only if it considers on reasonable grounds that both limbs of s91 (1) are made out;*
- b) It is for the consent authority to satisfy itself on the balance of probabilities about both those matters;*
- c) Reasonable grounds are required which imports an objective standard. Nevertheless, a consent authority is entitled to bring its own judgment and experience to bear on the issue and it is proper that some weight be given to those factors;*

⁴ HC, Auckland, AP23/02, 3 March 2004



d) *In respect of s 91(1)(a), the consent authority must be satisfied that other resource consents will (not may) be required in respect of the proposal. But, it is sufficient if the consent authority is satisfied on the balance of probabilities.*

e) *In relation to s 91(1)(b), the consent authority is concerned with understanding the essential features of the proposed activity to the extent that those features bear upon the effects of the proposed activity on the environment. A consent authority must be of the view that it is appropriate for the purpose of better understanding the nature of the proposal that applications be made for any one or more of the other resource consents required before it proceeds further. **If the nature of the proposal can be sufficiently understood without requiring the other applications to be made at that stage, then the consent authority is not entitled to make a s 91 determination.***

14 In *Kett v Auckland RC*⁵ Judge Sheppard similarly accepted that it is not always practicable to apply for all resource consent applications at once, especially for major projects on a large scale. He found that, despite the fact that other resource consents would be required for the proposal, it was not necessary for better understanding the nature of the proposal that future applications be made before proceeding. This approach has been adopted in subsequent cases.⁶

The Fonterra consents

15 In summary, we consider that the key points from the above cases are that:

15.1 The applicant can define its "*proposal*", i.e. its intended activity. In this case, Fonterra has defined its proposal as the discharge of wastewater to the Manawatū River at times when water cannot be stored or irrigated to land. This makes sense, in light of the existing activity and the renewal of APP-2003010585.02.

15.2 Submitters on Fonterra's wastewater discharge proposal will be well placed to properly understand the nature of the proposal and fundamentally the activities (discharge v landuse) have very different effects and are occurring in different locations.

16 Against the above, section 88(2)(b) of the Resource Management Act 1991 requires that any application for a resource consent should include an assessment of any actual or potential effects that the activity may have on the environment and the ways in which any adverse effects may be mitigated.

17 This Application and AEE includes such detail as corresponds with the scale and significance of the actual or potential effects the proposed activities may have on the environment, in accordance with Section 88(2)(b). The Application and AEE is also made in accordance with the information requirements in the Fourth Schedule to the Resource Management Act 1991.

18 The AEE identifies the further consents that Fonterra will be seeking, and provides a high-level assessment of the effects associated with those consents as well as the

⁵ ENV C A 86/2000, Environment Court

⁶ For example *Roman Catholic Diocese of Auckland v Franklin DC* (Environment Court W 28/2004); *Maclaurin & Ors v Gisborne District Council* A159/2003; Ngati Kahu in *Far North DC v Te Runanga-a-Iwi o Ngati Kahu* [2013] NZCA 221



ability for Fonterra to obtain those further consents.⁷ The AEE explains that the further consents for the proposed storage facility will be sought as a separate application, as:

- 18.1 the effects of the storage facility are limited in both time (construction effects) and location, given any effects from the storage facility will be limited to the subject and adjacent properties;
 - 18.2 Fonterra wishes to secure resource consent for the discharge to river before completing detailed design of the storage facility, the size of which will depend on the discharge consent conditions (and it is normal practice to ensure there is certainty as to the activity's ability to operate under a new consent, as well as certainty as to consent conditions which may influence design of any capital upgrades); and
 - 18.3 Fonterra are therefore proposing a consent condition which will require the storage facility and new discharge regime to be implemented within the first three years of grant of consent, in order to provide sufficient time for detailed design, obtaining earthworks consents for the construction activity, and that the earthworks can be undertaken during the normal earthworks construction season (i.e. summer period).
- 19 For the reasons outlined above, we consider that the nature of the proposal can be sufficiently understood without requiring other applications to be made at this stage, therefore Horizons Regional Council is not entitled to make a section 91 determination.⁸ Even though further consents will be required, the extent of the proposed river discharge is clearly outlined in the application and AEE, with the effects of the discharge effectively being confined to the River. The existing already consented land based discharge (along with changes to the land-based treatment infrastructure) are not relevant for understanding the effects of the discharge.
- 20 Rather, the final design and the building of any improvements to existing waste water management and (in particular) the proposed storage facility will only be able to occur when the outcomes of the river discharge are known. Again, further consents are not necessary for understanding the nature of the proposal – being the renewal of the existing consent to discharge to the river.

Yours faithfully

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⁷ See the Assessment EE, Appendix H Storage Planning Assessment

⁸ *Waitakere City Council v Kitewaho Bush Reserve Company Ltd and others* [2005] 1 NZLR 208