**General Statement by Tom Christie and Herb Familton to be considered alongside the GMCP's and Conditions resulting from Planning Conferencing with Stephanie Kane and Martell Letica.**

1) The annotated comments supplied at this stage are limited to the drafted conditions provided by the Applicant. They do not reflect what we would expect to see in a completed set of conditions. The additional conditions necessary would require further discussions with the technical team to prepare and finalise. We have not been able to proffer further conditions as we have not had technical review of conditions through conferencing, with exception to a proposed condition requiring validation of the Williamson model to assess the observed versus expected hydrological response to the management regime. (See issues identified at paragraph 18.)

2) This conferencing has been directed without considering the appropriateness of applying adaptive management principles to these applications. The D-G's legal counsel will address this through reply legal submissions.

3) Neither the Hearing Panel Commissioners nor D-G accepted the split of the GMCP into 3 groupings. The Panel indicated the aquifer should be considered as one and that there should only be one GMCP for all 24 takes. The D-G would appreciate the sharing of the rationale for three groups. The division into three GMCP's would only be supported if the aquifer had three hydrologically distinct sub-aquifer's. This has broader significance for the aquifers management and may result in insufficient reductions in take in the event of trigger level breaches.

4) The technical conferencing that has occurred to date, and the JWS's that were produced, have not allowed our technical team to fully discuss the complete extent of their concerns. The D-G's technical advisors have raised issue with the level of detail contained across the applications, suggested monitoring regimes, wetland and other surface waterbody monitoring, threatened species and general management practices that are not reflected in the draft conditions.

5) Clause 3.22 of the NPSFM 2020 requires regional authorities to avoid the lost of extend of natural inland wetlands. To achieve this clause 3.23(1) requires regional councils to identify and map every natural inland wetland in its region that is greater in extent than 0.05 hectares or is otherwise known to contain threatened species. As the regional council is yet to undertake this work the onus must fall upon the applicant(s) to complete this work in their vicinity to ensure their compliance with clause 52 of the NESFM 2020 when undertaking the earthworks, takes and discharges associated with these applications. The applicant has not undertaken this work or surveyed for threatened species, in our view the applicant(s) have not given effect to policies 6 or 9 of the NPSFM 2020.

6) Schedule 4 of the RMA clause 6(1)(b) requires an assessment of the actual or potential effect on the environment of the activity to be provided as part of any application as there may be further consenting requirements needed.

7) The proposed GMCP's look to undertake this work once consents are granted. It is our position that this is inappropriate and inconsistent with paragraph 5 above. It is further considered that with the inherent difficulties posed in ground water modelling that all

practicable steps should be taken to reduce uncertainty through monitoring and regular validation of the models in accordance with clause 1.6 of the NPSFM 2020.

8) The inability to do the above does not appropriately achieve the objective of the NPSFM 2020 by incorrectly prioritising the ability of people and communities to provide for their social, economic and cultural wellbeing over that of the health and wellbeing of the waterbodies and freshwater ecosystems. As such it fails to safeguard the life-supporting capacity of the freshwater ecosystems in accordance with s5(b) of the RMA.

9) Planning conferencing has been limited to planning matters as we are not in a position to comment on technical detail contained within the drafted conditions.

10) This letter is to be read in conjunction with the Statement of Evidence of Thomas Christie dated 21 August 2020.

**Issues identified with the management approach**:

11) GCMP's are considered to be relied on too heavily. The objective and performance standards detail should be established prior to possible granting of consents and contained within conditions. (see RMLR best practise Appendix 1) and Trans-Tasman Resources case.

12) The GMCP's are based on a high trust model with a large scope for amendment through processes sitting entirely internal to Council and outside of a formal s127/8 review. This process has been considered unsatisfactory in D-G's previous engagement with NRC.

13) We do not necessarily feel that simply applying the same conditions for the Motutangi Waiharara Water users group (MWWUG) is appropriate in this case. See letter from DOC dated 20th October to Northland Regional Council (NRC)(Appendix 2) for the D-G's issues and concerns on Groundwater Trigger Levels, Wetland trigger levels, and Wetland Monitoring.

14) The staging program does not take into account the realities of the community's water demands and the subsequent pressures this will place on the Aupouri system. Seasonal rainfall variation and orchard development amongst other factors, when combined with no requirements to exhaust each stage as a collective prior to progressing with higher takes could see a sudden, more substantial pressure on the system than is anticipated. Staging needs to be associated with use of allocation and duration.

15) Trigger Level breach protocols as they are proposed will likely disproportionally impact users. Applicants who were early to lodge application but later to commence irrigation will have their rights to take more severely diminished than those who have progressed through the stages.

16) The GMCP's should not be open to wholesale amendments on issues such as monitoring regimes and trigger levels. This level of detail would most appropriately be contained within conditions. Minor changes to the GMCP should be reviewed and assessed by an independent review panel. Our understanding is that the D-G is willing to participate in the design of such a panel. We do not support the practice of default approval of GMCP changes with restrictive timeframes and do not consider this to represent best practice.

17) There is an over reliance on the SIMPR to determine if abstraction should proceed to the next stage. This matter should have been resolved at consent stage and be part of a condition.

18) These 24 applications have relied heavily upon the accuracy of Williamson's ground water model. This model needs to validate and checked using expected and observed data on a regular basis. We therefore suggest the following condition, or to like effect, be included within all consents.
"The applicant shall by 31 August of each year, using relevant previous water year data, run the Williamson model to assess the observed versus expected hydrological response and provide a report on this exercise to NRC and DOC."

19) Policy D.4.11 requires the integrated management of surface water and groundwater in accordance with Appendix H.5 which states an assessment of hydraulic connection will be supported by a conceptual hydrogeological model that characterises the nature of local surface water/groundwater interaction. Representative hydraulic properties for assessment of the magnitude of surface water depletion will be derived from aquifer testing as well as assessment of representative values from the wider hydrogeological environment.

20) The monitoring framework to support the model therefore must be robust and spatially appropriate to detect adverse effects as this is a fundamental requisite of adaptive management.

Thomas Christie

20 May 2021

Herb Familton

20 May 2021

Appendices

1: RMLR best practise note.

2: Letter from DOC dated 20th October to Northland Regional Council. (NRC)

Resource Management Law Association
of New Zealand Inc.

# RESOURCE MANAGEMENT LAW ASSOCIATION ROADSHOW

## CONDITIONS OF CONSENT

Jennifer Caldwell, Michael Garbett, Alastair Logan and Martin Williams

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## INTRODUCTION

1. It goes without saying that conditions are an integral part of any resource consent granted. The High Court has nevertheless said as much including that:

   - The conditions of consent usually define (at least in part) the scope and extent of the consent,[1] and

   - Artificial distinctions should not be drawn between the activity consented to and the conditions of consent.[2]

2. Very recently, the Environment Court observed that a consent constitutes both "benefits and burdens" to the consent holder,[3] and further recorded as follows:

> Therefore, although on the face of it, a land use consent is simply permission to do something which is otherwise controlled or prevented by a rule in a regional or district plan, the ability to impose conditions substantially changes the nature of the resource consent. There is nothing new or particular about this, given the history of town planning legislation in New Zealand.
>
> Nevertheless, in recent years, conditions of consent have become far more elaborate, often to achieve regional or district planning objectives and/or to achieve environmental benefits for the public at large. So whereas a consent at one time may have permitted, for example, a building and limited its footprint and height, there are now often extensive conditions relating to planting, minimisation of visual impact, and earthworks.[4]

3. This extract of the Court's decision in *Maraetai Road* neatly touches upon the conundrum explored at this roadshow.

4. On the one hand, consent authorities must make decisions about whether to grant resource consent with reference to effects in their "mitigated state", and essentially 'assume' compliance with the conditions either offered by an applicant or as might be imposed.

5. As the High Court stated in 88 *The Strand Ltd v Auckland City Council*:[5]

> First, a consent authority, when it imposes conditions is entitled to assume that the applicant *and its successors* will act legally and adhere to rules and conditions: see *Barry v Auckland City Council* [1975] 2NZLR 646 (CA) at 651. That is obvious.

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[1] *Gillies Waiheke Limited v Auckland City Council* A131/02. Unreported. High Court. Auckland. 20 December 2002. Randerson J.
[2] *Body Corporate 970101 v Auckland City Council* (2000) 6 ELRNZ 183.
[3] *Maraetai Road Limited v Auckland Council* [2014] NZEnvC 105, at paragraph 20.
[4] Ibid at paragraphs 24 and 25.
[5] [2002] NZRMA 475, at paragraph 19.

> Nothing could ever be approved if consent authorities had to work on the contrary assumption, namely that its rules and conditions would not be observed. There is no suggestion in this case that the noise conditions *cannot* be observed.

6. That finding of the High Court was applied by the Court of Appeal in *Palmerston North City Council v Dury*[6] with the Court stating:

> The Council was entitled to rely on the assurance that the noise standard would be complied with: see *Barry v Auckland City Corporation* [1975] 2NZLR 646 at 651 (CA). If the standard was not complied with, residents and Council alike had a number of remedial options available to them, including remedies achievable on an urgent basis.

7. On the other hand, the realities of the situation are difficult to put aside, including the stark outcomes of the research of Dr Marie Brown as also presented at this road show, namely that:

> As many as a third of resource consent holders were not complying with their obligations set under consents granted based on the ecological measures promised by them.

8. This reality gives cause to reflect upon how safe the assumption the High Court has ruled consent authorities must make, really is!

9. At the very least, the reality gives impetus to the aspirations for this road show series, including that the "challenges and pitfalls" impeding successful implementation of consents and compliance with conditions (as outlined by Principal Environment Judge Newhook) are both clearly understood and better addressed.

**Scope of Paper**

10. With that in mind, and as a prelude to subsequent papers from other presenters at this road show, this paper covers:

- An overview of basic requirements, essentially a "101" on setting valid and enforceable conditions.
- A recommended approach to referencing application material in consent conditions (directly recording key mitigation recommendations in application material as express obligations).
- An overview of the key legal requirements for management plan consent condition frameworks (what must be set up front, what decisions can be deferred until the post-consent phase).

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[6] [2007] NZCA 521, at paragraph 28.

- The basic requirements for adaptive management approaches within consent condition frameworks (when this approach is available, and how it should be applied).

- The range of "securities" available to consent authorities to promote compliance, short of taking direct enforcement action (such as bonds, consent notices, covenants and encumbrances).

11. These themes will be explored further by the planning experts in their session (particularly in relation to management plan and adaptive management frameworks), as well as by members of the Environment Court bench who will be addressing the roadshow on issues arising in a "complex development" scenario, where much of what this paper outlines is most sorely put to the test.

## BASIC LEGAL REQUIREMENTS

12. The starting point is section 108 of the RMA, which grants consent authorities a general power to impose "*any condition that the consent authority considers appropriate, including any condition of a kind referred to in subsection (2).*" In the words of the Supreme Court[7], this is a "*broadly expressed discretion*", and is subject only to any express provision found elsewhere in section 108, and to any regulations.[8]

13. Section 108(2) provides a non-exhaustive list of conditions which may be imposed, including:

(a) Requiring a financial contribution (subject to the constraints in s108(10)) or a bond (subject to the requirements of s108A);

(b) Requiring the provision of services or works (examples given include the protection or planting of trees or vegetation, or the protection, restoration or enhancement of any natural or physical resource);

(c) Covenants to secure performance of a condition;

(d) Requiring holders of discharge permits (and coastal permits relating to discharges) to adopt the best practicable option to prevent or minimise any actual or likely adverse effects the discharge will have on the environment (subject to the constraints in s108(8));

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[7] *Waitakere City Council v Estate Homes* [2007] 2 NZLR 149

[8] Note that section 108 does not apply to conditions imposed in relation to designations, although the common law *Newbury* requirements do, and various Board of Inquiry decisions on NoRs (*Waterview*, *Wiri Men's Prison*, *Transmission* Gully) have rejected proposed conditions that have no connection to the proposal or its effects.

(e) Requiring creation of an esplanade reserve or strip in respect of any reclamation consent;

(f) Conditions specific to subdivision consents as set out in section 220.

14. In addition, ss108(3)-108(5) allow consent authorities to impose information supply and monitoring conditions.

15. In addition to these statutory requirements, the common law requires any resource consent condition to satisfy a range of other criteria in order to be valid, derived initially from the House of Lords decision in *Newbury DC v Secretary of State for the Environment*[9]. The *Newbury* requirements as originally stated were:

(a) The condition must be imposed for a [resource management] purpose and not an ulterior purpose;

(b) The condition must fairly and reasonably relate to the activities authorised by the consent to which the condition is attached; and

(c) The condition must not be so unreasonable that a reasonable planning authority, duly appreciating its statutory duties, could not have approved such a condition.

16. The *Newbury* test has been modified by the New Zealand courts in recent years. In 2001 the Court of Appeal in *Housing NZ Ltd v Waitakere City Council*[10] held that *Newbury* remained of general application and should continue to be applied by the New Zealand courts in relation to the RMA, but the test was revisited by the Court of Appeal[11] and thereafter the Supreme Court[12] in the *Estate Homes* cases.

17. The Court of Appeal held that a causal link was required between the effects of the proposal and the conditions imposed. On appeal, the Supreme Court took a more liberal view of the "*fairly and reasonably relate*" second arm of the *Newbury* test, and concluded that:

> *... the application of common law principles to New Zealand's statutory planning law does not require a greater connection between the proposed development and conditions of consent than that they are logically connected to the development. This limit on the scope of the broadly expressed discretion to impose conditions under s108 is simply that the Council must ensure that conditions it imposes are not unrelated to the subdivision. They must not, for example, relate to external or ulterior concerns. The limit does not require that the condition be required for the purpose of the subdivision.* [13]

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[9] [1981] AC578, [1980] 1 All ER 731.
[10] [2001] NZRMA 202
[11] [2006] 2 NZLR 619, [2006] NZRMA 308
[12] [2007] 2 NZLR 149
[13] Paragraphs [64] to [66]

18. In applying this reasoning, the Supreme Court held that a condition on a subdivision consent requiring part of the access road to the subdivision to be built to the standards of an arterial road (so as to provide both lot access and for an arterial road designation on the subdivided land) satisfied the *Newbury* "fairly and reasonably related" requirement.

19. Other cases have added to the validity tests. The Environment Court in *Cookie Munchers Charitable Trust v Christchurch City Council*[14] determined that, in addition to meeting the *Newbury* requirements, a condition must be considered by the consent authority to be appropriate in light of the sustainable management purpose and principles of the RMA, essentially reading Part 2 into the wording of s108(1).

20. A review of case law suggests that best practice in the development and imposition of conditions will avoid the following, all of which may be invalid:

(a) Conditions which involve the delegation of council duties (including decision making and enforcement duties) or the delegation of judicial duties (such as the discretionary ability to determine a disputed issue which may arise in the conducting the consented activity). Conditions which require expert certification or expert oversight of an activity (or parts of an activity) may however be considered valid;

(b) Conditions which are imposed outside the legal powers of the consent authority. An obvious legal limitation on a consent authority's ability to impose conditions derives from the activity status applied in regional and district plans. For controlled and restricted discretionary activities conditions can only be applied on matters over which the relevant plan retains control or discretion;

(c) Conditions which would derogate from (or nullify) the grant of the consent. Examples include conditions which require application for further resource consents in order for the proposed activity to occur, conditions restricting the capacity of a consented land use (such as a school or child care facility) or the hours of operation of the activity (such as an airport) to a level which renders the proposal unviable;

(d) Conditions which would limit an individual's ability to exercise statutory legal rights available to them (such as the ability to appeal a resource consent decision).[15]

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[14] 2008, W090/08, Environment Court, Wellington.

[15] This is particularly apposite to conditions imposed on designations which attempt to force requiring authorities to exercise their Public Works Act powers of property acquisition within a specific time period or in a prescribed manner.

(e) Conditions which require actions of third parties who are not parties to the consent (or to any appeal) or rely on the occurrence of particular future events.

21. Other factors that can be regarded as best practice include drafting that is clear and unambiguous, conditions that are practicable and enforceable, and conditions that accurately reflect not only the proposal advanced in the application but also any modifications suggested or offered in evidence during the course of a hearing. This is particularly relevant to complex projects, where the development of conditions is an iterative process through the hearing phase, likely requiring the input of multiple parties.

22. Management plan conditions are discussed separately below.

23. A succinct and useful prescription for condition drafting is that set out by the Environment Court in *Ferguson v Far North District Council*,[16] namely that a condition "requires specificity, clarity and accuracy of expression leading to certain measure of certainty, before it can be enforceable."

## REFERENCING APPLICATION MATERIAL

24. We are all no doubt familiar with the almost universal "Condition 1" of any consent, requiring that the development proceed "in general accordance with the application". The "accordance" condition allows consent authorities to draw upon application information (the AEE, plans, expert reports) to form operational controls on consented activities as an alternative to imposing numerous conditions to the same effect.

25. As the High Court stated in *Gillies v Waiheke v Auckland City Council*[17]:

> In the present case, condition 1 of the resource consent incorporated by reference the information and plans submitted as part of the application. A condition of that type is long established in practice. The validity of including documents by express reference in resource consents was settled many years ago by Macmillan J in *Attorney General v Codner* [1973] 1 NZLR 545, 551. The authorities were more recently reviewed in a helpful and wind ranging discussion by the Environment Court in *Clevedon Protection Society Incorporated v Warren Fowler* (1997) 3 ELRNZ 169.

26. We will discuss what the term "generally in accordance" means presently (i.e. how much scope for variation it provides for in consent implementation) along with judicial endorsement (to an extent) of the degree of tolerance it provides for a 'practical and robust' approach, particularly in respect of complex projects.

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[16] [1998] NZRMA 238 at 244.
[17] Supra note 1, at paragraph 25.

27. Experience suggests however that it is not helpful to simply refer in "condition 1" to *all* of the application material, or to list a series of plans that have been put to the consent authority, on the basis that the development must proceed in accordance with those documents. There is likely to be a myriad of expert reports and plans that would inform the consent authority's decision, certainly for complex developments, and as a matter of jurisdiction, the application material would generally constrain the scope of any consent granted (regardless of whether expressly referred to in the consent).

28. *Gillies* concerned enforcement proceedings brought by the Council against land owners for unauthorised earthworks. In the course of constructing a dwelling and swimming pool they had moved 2,300m³ of earth (compared to a permitted level of 20m³ under the District Plan). Their resource consent did not specify the volume of earthworks consented, either in the general grant or in the conditions. The Council relied on the "accordance" condition, which referred to an earthworks plan that contained a notation referring to 765m³ of earthworks.

29. The Court (of Appeal) held that the operational scope of consents could be validly determined by references in conditions to supporting application documentation, and that those should be interpreted objectively, from the perspective of a reasonable observer. On that basis, an ordinary person reading the earthworks plan would have considered that 765m³ was the total volume of earthworks proposed by the applicant and formed the consented limit for that activity.

30. But as *Gillies* and other cases[18] demonstrate, there can be 'hidden dangers' in simply referencing a whole list of plans and reports in a consent, and it is preferable to record any important limitations on the scale of the development, or obligations as to mitigation, expressly in consent conditions themselves. The potential for uncertainty or indeed conflict within the body of application material otherwise arises. That material may not have been 'authored' with the express purpose of setting specific obligations around mitigation, but instead to explain effects and how they might be addressed in more general terms.

31. Illustrating the latter point, in *New Zealand Windfarms Ltd v Palmerston North City Council* the High Court on appeal from the Environment Court considered whether the consent holder (NZWL) in respect of 97 wind turbines under construction at the Te Rere Hau wind farm was bound by both the specific noise standards contained in consent conditions 4 and 5 (setting allowable noise levels in various receiving locations), and its own predictions as to the sound levels to be generated by the turbines once operational. Those predictions were set out in a noise impact assessment report (NIAR) lodged as part of the application, and were encompassed by Condition 1 in the consent requiring the wind farm to be constructed and operated

[18] See for example *New Zealand Windfarms Limited v Palmerston North City Council* [2013] NZHC 1504.

in accordance with "all the information, site plans and drawings accompanying the application or submitted as additional information".

32. The Environment Court in declaration proceedings had determined that the wind farm was operating in breach of condition 1 because the turbines were producing higher sound power levels than predicted in the NIAR, and special audible characteristics, contrary to the NIAR predictions. One of the reasons for this decision was the Court's view that the AEE is "the bedrock upon which resource consent applications are founded", and that "the need for accuracy and integrity in the application documents is self evident". NZWL appealed against the declaration made on the basis that the Environment Court's interpretation would impose additional restrictions on noise (by virtue of condition 1) to those specific restrictions in conditions 4 and 5.

33. The High Court approached the issue by asking firstly, what was the intended acoustic scope of the application and secondly, what were the intended limits on noise in the original consent decision? On the first question, the Court found that on an objective reading of the NIAR and the consent decision, the predictions as to sound power and special audible characteristics were not intended to go to the acoustic scope of the proposed activity; *rather, they related to how the predicted noise levels (at the receiving locations) would be achieved, not what the levels should be*. The NIAR predictions were relied on as part of modelling calculations to support mitigation noise standards that were requested by NZWL, accepted by the decision maker and imposed as conditions 4 and 5:

> *So operated "generally in accordance with the information accompanying the application" is to be read as affirming the scope of the application as the outer limit of consent. The term "operated" must mean operated within those limits because they were explicitly requested by the appellant and set by the consent commissioner as the allowable limits of operation ....*[19]
>
> *[NZWL's noise expert] also said that these sound levels will be very achievable for NZWL because of the positive noise generation characteristics of the [turbine]. He was of course completely wrong, but that does not change what was actually asked for.* [20]

34. There was therefore no conflict between condition 1 and the specific conditions, and the Environment Court's approach read the Condition 1 noise prediction material out of context and without reference to the purpose of that material.[21] The appeal was allowed.

35. As this case demonstrates, reliance on application material for enforcement can create difficulties for the consent holder, neighbours, and consent authority in years

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[19] Ibid, at para [62].
[20] Ibid.
[21] Ibid, para [63].

to come, when the application material is not "fresh in the mind" or even vaguely familiar to those involved.

36. These difficulties are further demonstrated in *Re Queenstown Lakes District Council*[22] where the consent authority sought a declaration against the holder of a 32 lot subdivision consent in relation to the construction of ponds and mounding referred to in a plan submitted with the original application in 2000. The application was contentious and resulted in numerous Environment Court (in 2004), High Court and Court of Appeal decisions, but the final decision granting consent subject to conditions was released in 2006. Condition 1 of the consent required the activity to be undertaken "in accordance with the plans and specifications submitted with the application". There was no express reference in the consent conditions to the water features and mounding plan, and in 2010 the consent holder was keen to reduce the extent of ponding and mounding in the next stage of the development.

37. The Court considered the 2004 and 2006 decisions carefully, in addition to the original application material, and determined that the original plan for ponds and mounding was integral to the proposal and to its ultimate success in consenting terms. The declaration was granted, with the Court observing[23]:

> *Fundamentally, a Court makes a decision on that which is presented to it, and if landscape features are presented in a concept-type format, then the broad parameters of that must, in my view, be incorporated in the end design. The only way they can be changed is for proper application to be made under s127, which would enable a decision maker to carefully consider the impacts of the proposed change against the parameters of the original consent. It would invite speculation to simply accept an applicant's perspective that a proposed variation would achieve an outcome that is similar to that which was decided by a consent authority.*

**Recommended Approach**

38. To summarise our discussion of this issue to this point, the ideal is a self contained consent document that is complete on its face. Earlier case law was to the effect that application material could not be applied in construing a consent unless expressly referenced.[24] Consents run with the land and people interested in a development should not have to undertake a detailed investigation to work out what was approved. This is no longer the legal position,[25] but the ideal remains valid.

39. The better approach in our view then is that care is taken to specify the scope of the consented activity, including any changes made to that scope through the application and hearing process; to identify any and all key mitigation recommendations in

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[22] [2011] NZEnvC 72.
[23] Ibid, paras [70] – [71].
[24] *Attorney General v Codner* [1973] 1 NZLR 545.
[25] *Red Hill Properties v Papakura District Council* (2000) 6 ELRNZ 157.

application material including expert reports in the AEE and as modified through any hearing process, and to expressly record those limitations and mitigation recommendations as direct consent obligations in conditions themselves.

40. The standard "condition 1" can then serve a more practical and useful purpose in permitting a degree of "realism", providing scope for immaterial variations relative to the application material put to the consent authority, but playing a secondary role to the substantive conditions for future enforcement purposes.

**Generally or Strictly in accordance?**

41. Finally, we note there is sometimes debate as to whether conditions of this kind should be phrased with reference to a "generally in accordance" imperative, or "in accordance, or even "strictly in accordance".

42. Left to operate in the manner we recommend (rather than as a primary platform enforcement), this debate probably matters less.

43. It is notable however that in the *Palmerston North Wind Farms* case the Environment Court rejected an argument that a condition using the phrase "generally in accordance" failed the requirements for specificity, clarity, accuracy of expression and certainty.

44. The Court stated:

> *"[75] We agree with NZWL's submission that Condition 1 is a catchall condition which we understand to mean a general condition applying to all aspects of the consent. That is the whole point of such conditions which are commonly imposed on resource consents and which (in general terms) simply require that consent holders do what they said they were going to do in their applications.*
>
> *[76] Turning to the question of uncertainty, it appears to us that there are two potential areas of uncertainty apparent in Condition 1:*
>
> - *Firstly use of the term "generally in accordance with":*
> - *Secondly, what documents are incorporated within the description "all the information, site plans and drawings accompanying the application or submitted as additional information".*
>
> *[77] Dr Mitchell testified that resource consents commonly contain conditions requiring compliance with specific plans and that for more complex projects where it is practically impossible to specify all of the plans and details that apply to the activity in question, such conditions are sometimes expanded to require general compliance with the information supplied with an application. Dr Mitchell's observations in that regard are similar to our own. He went on to*

*note, however, that he had never seen the general compliance type of condition used as an enforcement measure.*

*[78] Dr Mitchell and Mr Holm, appeared to agree with the proposition advanced by the Council Planner (Mr C L Auckram) that the term "generally" allows "some tolerance" in terms of compliance with the information contained in the AEE. We agree with Dr Mitchell's observation that this is a practical and robust approach to the imposition of conditions, particularly in respect of complex projects. The alternative of requiring compliance with application plans and information in the most minute detail seems both impracticable and unreasonable. We do not consider that use of the term "generally in accordance with ... " of itself, invalidates Condition 1."*

45. For guidance as to how much scope for variation a "generally in accordance" prescription enables, reference can be made to the decision of the Environment Court in *Cooke v Auckland City Council*[26] in which the Court determined the phrase "generally in accordance" enabled alterations to plans that were not "material". In determining whether a possible variation is within scope (or conversely comprises a material variation), regard would be had to:

(a) Whether the variation would contravene a district rule that would not be contravened by the unvaried proposal;

(b) Whether it would contravene a district rule to an extent greater than the unvaried proposal; or

(c) Whether it would have greater adverse effects on the environment than the unvaried proposal.

46. The Court acknowledged that "using that as a test of whether a variation is material or not runs close to begging the question in marginal cases" and that a 'judgment' is required.

**MANAGEMENT PLAN CONDITIONS**

47. Management plans have become increasingly important to complex consents (and designations) in recent times, and while they have been the subject of some discussion in the Environment Court, there is also useful guidance to be derived from various Board of Inquiry decisions as to what constitutes best practice in the drafting of management plan conditions. The difficulty of course lies in striking the balance correctly between providing enough of the proposed content of the management plan to the decision maker to assist with assessment of the proposal, and the need to retain a degree of flexibility where additional information on effects or mitigation options may emerge at a later date. It seems that the balance will be determined in

[26] [1996] 2 ELRNZ 271.

large measure by the facts of each case and the degree to which the information to be provided in the plan is crucial to the decision whether to grant consent.

**Court Guidance**

48. One of the earlier Environment Court decisions is *Wood v West Coast Regional Council*[27] which acknowledged that while it might be desirable and appropriate in some circumstances to submit a fully formulated management plan in advance of the grant of consent, there are difficulties where the plan might benefit from future amendments (for example, to keep pace with developments in technology). The appropriate balance between these two tensions was agreed by all parties and documented by the Court in the following terms[28]:

> *... a management plan can be required to be prepared pursuant to section 108(3) of the Act, but its purpose should be to provide the consent authority and anyone else who might be interested, with information about the way in which the consent holder intends to comply with the more specific controls or parameters laid down by the other conditions of consent. So, for example, in the case of noise, specific noise control limits can be laid down but the way in which these are to be complied with is for the consent holder who can be required to provide a management plan containing information about the method of compliance. However, because technology might change over time the consent holder should have the ability to change the management plan without having to go through the process of seeking a change to the conditions of consent.*

49. The Court did not require a fully formulated management plan in that case. Contrast that approach with the directive given by the Court in its interim decision on *Crest Energy v Northland Regional Council*[29] that "a fully fleshed EMP should be prepared at this juncture" because there it raised too many unanswered questions:

> *[222] The question of whether consent should be granted at all hinges on an ability to create an EMP that will adequately address the issues. We are not prepared to effectively transfer responsibility for this crucial area of assessment to a delegated officer of the respondent.*
>
> ...
>
> *[229] ... the Court must be satisfied that the environmental management plan can operate in a way that will serve the purpose of the Act.*

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[27] [2000] NZRMA 193. Note: *Wood* refers to *New Zealand Rail v Marlborough District Council* (1993) 2 NZRMA 449, in which the Planning Tribunal noted that if an applicant was relying on a management plan as a means of avoiding, remedying or mitigating adverse effects, that plan should be formulated so it could be scrutinised by the Court and if accepted, included in the consent conditions. That approach is now regarded as being too narrowly focused.

[28] Ibid, pp6-7.

[29] (2009) Environment Court, A132/09

50. The concept of adaptive management was at the heart of concerns about the adequacy of the Crest EMP condition, and that issue is discussed further below, but the Court's observations about the desirability of setting objectives in management plan conditions have been noted by several Boards of Inquiry as an aspect of best practice.[30]

**Board of Inquiry Guidance**

51. The Board of Inquiry Final Report on the *Transmission Gully* proposal discusses the use of management plans as the focus of effects management in considerable detail, and in particular how the management plan process would work in practice.[31] The Board was particularly concerned to ensure that the extensive use of management plans requiring approval or certification by council officers would not result in what would in effect be delegation of its decision making obligations[32]:

> *Ultimately, we determined that was not the case, provided the conditions of consent imposed contained clear objectives to provide focus to management plan provisions and performance criteria which operate as bottom lines which the management plans must achieve. In other words, the conditions imposed by the Board would identify the performance standards which had to be met and the management plans would identify how those standards were to be met.*

52. The Board also set out a helpful process for certification of management plans, including the following considerations:[33]

- Does the management plan generally accord with draft management plans submitted with the application or provided in the evidence?
- Has the management plan in question been prepared in accordance with the relevant conditions of consent?
- Has consultation been carried out in accordance with the relevant conditions of consent (if required)?
- Does the management plan meet the objectives or standards prescribed by the relevant conditions of consent?

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[30] See in particular *Final Report and Decision of the Board of Inquiry into the Transmission Gully Proposal* (EPA, June 2012 and *Final Report and Decision of the Board of Inquiry into the MacKays to Peka Peka Expressway Project* (EPA, April 2013).
[31] Ibid, para 970.
[32] Ibid, para 190.
[33] Ibid, para 197.

**Denniston Plateau**

53. The most recent Environment Court case to discuss management plan condition requirements is the second interim Denniston Plateau decision, *West Coast Environmental Network v West Coast Regional Council.*[34] The conditions attached to the grant of consent to Buller Coal to establish an open cast coal mine on the Plateau's southern end included the preparation and certification of five management plans prior to undertaking the consented activity. The plans related to ecology and heritage management, mine operations management, coal processing plant operations management, social impact management, and biodiversity management, and the Court observed that at least three of these would be lengthy and complex.

54. The ecology and heritage management plan condition set out a range of objectives that each section of the plan would contain, a series of matters that each section would deal with, and a requirement for an appropriately qualified expert to be appointed to oversee and report on all inputs into the plan. Forest & Bird argued that the combination of broad objectives and a list of areas to be addressed, rather than specific targets to be met, resulted in the role of the certifier going beyond the acceptable parameters of that role and allowing the appointee to make findings of fact on matters that were essential to the grant of consent, essentially resulting in an unlawful delegation of decision making.

55. The Court rejected this submission in the following terms:

> *Our interim decision also made clear that knowledge of the eco-systems on the Denniston Plateau is incomplete … In such circumstances, the conditions dealing with the management of what all parties recognise as important eco-systems need to be flexible enough to allow the best possible environmental outcome to be achieved in the light of advancing knowledge and experience. What a management plan certifier is being asked to do is to confirm that the management plan concerned is the most appropriate means available at any given time to achieve the objectives stated in the conditions.* [Para 43]
>
> *[Some of the management plans] contain less certainty in some areas at this stage. … we have decided that the extent of the drafting undertaken at this stage is adequate because the requirements for these management plans must be read in conjunction with the hold points and controls embedded in other conditions.* [Para 45]

56. Our planning colleagues refer in their presentation to the useful distinction made in another case[35] between a *process* driven approach to management plan conditions (which focuses on the process for preparing the plan and submitting it for approval) and an *outcome* driven approach, which results in management plan conditions that give greater detail in relation to the outcomes sought to be achieved by the

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[34] [2013] NZEnvC 178.
[35] *Royal Forest & Bird v Gisborne District Council* (2009) W026/09. [2013] NZRMA 336

management plans. The outcomes then represent the context within which the process of developing the management plans would operate.[36]

## ADAPTIVE MANAGEMENT – LEGAL REQUIREMENTS

57. The High Court and Court of Appeal's assumptions about compliance with consent conditions (in granting consents) get somewhat tested in the case of management plans, where the detail of mitigation is left to be fleshed out in the post-consenting phase. This of course underscores the need for clearly set objectives, performance measures and/or "hold points" as they have been described in the case law addressed earlier, so the consent authority knows what the management plan(s) will *set out to achieve* by way of mitigation in advance of any substantive decision.

58. In entering the realm of adaptive management however, the assumptions are arguably stretched to breaking point. To an extent adaptive management involves an *acceptance* that we don't know what the ultimate degree of impact will be, let alone what can be done about it, should the worst case scenario arise.

59. For this reason, real care is needed in framing conditions to ensure a *significant irreversible impact* does not result. There are limitations (related to that concern) established through the case law as to the circumstances within which an adaptive management approach can be applied, as a legitimate alternative to refusing consent. These issues and limitations are addressed in detail presently.

60. In addition, as a matter of basic principle, the consent authority's essential function must remain "front and centre", and cannot be delegated (or indeed *abdicated*).

61. In *Director-General of Conservation v Marlborough District Council*,[37] the High Court considered an adaptive management framework approved by the Environment Court for a marine farm. The structure of the approach adopted was that, after an initial two year survey (post-consent), the ability to implement consent would depend on whether the results satisfied the consent authorities that it was very probable the site was *not* of special significance to the local population of Hector's dolphin.

62. The Environment Court was found to have gone beyond what is permissible (by way of setting an adaptive management framework). The High Court stated:[38]

> Whether the site is of special significance for Hector's dolphin goes to the issue of whether or not the consent should be granted. It is a question which, if it is sufficiently important to have a bearing on whether the consent should be granted or not, should be decided by the Court itself. It is not a question which can properly be delegated.

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[36] Ibid, paras [84] to [93].
[37] Unreported. High Court. Wellington. CIV-2003-485-2228. 3 May 2004. Mackenzie J.
[38] Ibid, at [28].

63. The matter was sent back to the Environment Court to determine that fundamental issue as a matter of whether consent should be granted (which the Environment Court duly did, including with reference to an adaptive management framework that it determined met the High Court ruling).

64. There has been a series of Environment Court decisions, including that at issue in the marine farm case just mentioned,[39] through which a number of principles and basic requirements for adaptive management emerge, as canvassed below.

65. We then address the recent decision of the Supreme Court in *Sustain our Sounds Inc v New Zealand King Salmon Company Ltd,*[40] where the principles and basic legal requirements as established by the Environment Court were considered further, with the benefit of guidance from international law documents and decisions in other commonwealth jurisdictions.

**Environment Court Decisions**

66. Firstly we note the decision in *Golden Bay Marine Farmers v Tasman District Council,*[41] whereby the Environment Court defined "adaptive management" as involving:

> An experimental approach to management, or "structured learning by doing". It is based on developing dynamic models that attempt to make predictions or hypothesis about the impacts of alternative management policies. Management learning then proceeds by systematic testing of these models, rather than by random trial and error. Adaptive management is most useful when large complex ecological systems are being managed and management decisions cannot wait for final research results.[42]

67. The Court heard competing arguments about the suitability of adaptive management in the context of provision for Aquaculture Management Areas for marine farming.

68. The Court referred to a range of expert evidence stressing the need within any adaptive management framework for (among other things):

- Baseline surveys;
- Flexibility of staging;
- Monitoring over time with trigger levels and subsequent refinement of the management regime;

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[39] *Clifford Bay Marine Farms v Marlborough District Council* C131/2003.
[40] [2014] NZSC 40.
[41] W19/2003, at [405]. This aspect of the Environment Court's decision was upheld on appeal in *Minister of Conservation v Tasman District Council* (Unreported. High Court. CIV 2003-485-1072. 9 December 2003. Young J)
[42] Paragraph 405 of the decision.

- Each stage being dependent on reviewed information;
- Reduction of risk in subsequent stages.[43]

69. The Court stated:

> The need for disclosure in a transparent way, of any discoveries about the ecosystem or changing information so that the [Council] can ensure steps are taken **before significant adverse effects eventuate**, is an important benchmark of adaptive management.[44](emphasis added).

70. The Environment Court's decision enabled staged provision for marine farming with approval for 50 hectares at stage 1, analysis of the effects, and if the effects were acceptable then further staged development of a remaining (consented) further 200 hectares could proceed.

71. An important element of the Court's reasoning in the decision was that there is scope for "stopping or reversing" development within the review and enforcement provisions of RMA, including ultimately a power under s132(3) of the Act to cancel a resource consent, if the application contained inaccuracies which materially influenced the decision to grant.[45]

72. That dimension of the decision was upheld on appeal.

73. In essence, the High Court rejected an argument that the RMA review provisions were not "designed to deal with adaptive management".[46] It was argued before the High Court that consent applicants would have approval for the entire 250 hectares, and preventing mussel farming in the remaining 200 hectares (depending on the outcome of evaluation as to the effects of the first 50 hectares) would not be open to the consent authority.[47]

74. The High Court concluded:

> I am satisfied that as the Environment Court identified, a combination of statutory provisions and conditions associated with the granting of consent would allow adaptive management, whole block consents and properly protect the environment as identified through environment research and the adaptive management regime.[48]

75. More recently, in *Crest Energy Kaipara Limited v Northland Regional Council,*[49] a case involving a staged "array" of 200 turbines on the seabed of the Kaipara harbour, the Environment Court set out its overview of the concept of adaptive management

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[43] Paragraph [ 406] of the decision.
[44] Paragraph [407] of the decision.
[45] Refer paragraphs 467-478 of the decision.
[46] Paragraph [37] of the High Court decision.
[47] Paragraph [38] of the High Court decision.
[48] Paragraph [46] of the High Court decision.
[49] A132/2009.

as developed though the earlier Environment Court decisions, including the *Golden Bay Marine Farmers* case, and the *Clifford Bay Marine Farms* case mentioned earlier.

76. The Court stated as follows:

> [223] At the heart of the issue is the concept of adaptive management, which is what the parties have generally had in mind when debating some uncertainties of effects in the case.
>
> [224] The concept of adaptive management has developed through a number of decisions of the Environment Court, for instance, *Golden Bay Marine Farms v Tasman District Council*[50], *Clifford Bay Marine Farms v Marlborough District Council*,[51] and *Lower Waitaki River Management Society Inc v Canterbury Regional Council.*[52] The concept has arisen in a range of situations, often involving uncertainties about potential impacts of proposed mussel farms, but including in the recent *Lower Waitaki* decision, issues of riverbed geomorphology and riverbed vegetation.
>
> [225] The problems of modelling ecological responses to changes in conditions introduced by new technologies for water management regimes have led to the use of the technique, very often through the imposition and subsequent refinement of management plans of various kinds.
>
> [226] Important in the design of such management plans is the collecting of baseline knowledge upon which management plans can build in an on-going and cycling process. Steps have been identified in some such plans,[53] that involve setting objectives, designs and planning for management of the resources, the managing of the resource, monitoring, evaluation of monitoring results, reviewing and refining hypotheses, the management plan and programme to better meet the objectives. After that point the process will often start again at the design and planning level.
>
> [227] We have deliberately stressed the setting of objectives, because, as we said in the *Lower Waitaki River* decision, the Court will always be careful to ensure that the objectives for adaptive management are reasonably certain and enforceable, and sometimes will call for further detail in draft management plans so as to be reasonably confident of their success.
>
> [228] We are mindful of the findings of the court in *Director General of Conservation v Marlborough District Council and Ors* (Clifford Bay),[54] that we should not place the applicant in the position of having to have carried out all necessary research before making an application or before a hearing by the Court, simply because it is seeking a privilege from the Crown. It would be

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[50] W19/2003 at [405] and [407 – 408].
[51] C131/2003.
[52] C80/2009.
[53] See for instance [381] of the *Lower Waitaki River* decision.
[54] C113/2004.

> unfair and unreasonable to hold that an applicant must try to anticipate and research all hypotheses that may occur to someone during the course of an application process.[55]

77. Having regard to this analysis of the various authorities by the Court in *Crest Energy*, the key requirements of successful adaptive management can be listed as follows:

(a) Collection of baseline knowledge upon which management plans can build in an on-going and cycling process;

(b) Setting of clear objectives (that are reasonably certain and enforceable);

(c) Design and planning for management of the resource;

(d) Managing of the resource;

(e) Monitoring, evaluation of monitoring results, reviewing and refining hypotheses, the management plan and programme to better meet the objectives;

(f) Repeating the process at the design and planning level.

78. Beyond what adaptive management involves, we suggest an "acid test" for adaptive management was as put by the Environment Court in *Clifford Bay Marine Farms v Marlborough District Council:* [56]

> The case must therefore turn on whether the conditions proposed, in particular the monitoring regime and adaptive management strategy, can first detect and secondly remedy any effects that might arise **before they become irreversible**.

79. This point (or acid test as we have coined it) has a parallel with the observation cited earlier from the *Golden Bay Marine Farmers* case, about the need to ensure steps can be taken **before significant adverse effects** eventuate.

80. As now explained, these essential requirements for adaptive management are underscored in the Supreme Court's recent analysis, again in the context of marine farming.

**Precautionary Approach – Refusal of Consent?**

81. The *Sustain our Sounds* judgment brings to the fore the tension between any adaptive management proposal, and the implications of the precautionary approach where potentially significant effects are at stake, and another answer might be to simply refuse consent altogether.

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[55] See [40] of that decision (A 132/09).
[56] C131/2003, at paragraph 118, as cited by Counsel for Forest & Bird at paragraph 12.

82. In that regard, the provisions of the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (**EEZ Act**) are of interest.

83. As well as including an express definition of what the adaptive management approach is said to comprise in the context of that Act,[57] s61 states:

> (2) If, in relation to making a decision under this Act, the information available is uncertain or inadequate, the EPA must favour caution and environmental protection.
>
> (3) If favouring caution and environmental protection means that an activity is likely to be refused, the EPA ***must*** **first consider whether taking an adaptive management approach would allow the activity to be undertaken**.

84. Consideration of adaptive management as an alternative to refusing consent is not mandatory under RMA. If advanced to it by an applicant, a consent authority would nevertheless no doubt consider whether an adaptive management approach was open in a case where there was uncertainty over effects, and how they might be managed to avoid an irreversible significant impact.

### *Sustain our Sounds* – Background

85. The issue in *Sustain our Sounds* was precisely whether such an approach was open to the Board of Inquiry, in approving four of the nine marine farms (for salmon farming) in question.

86. The essential argument put to the Supreme Court was that there was too much uncertainty, and effects of such potential significance, that (as a matter of law) a precautionary approach required that they be refused. To understand that argument, a brief introduction to the facts of the case is needed.

87. The applicant's proposal was that each site would have a maximum initial annual discharge of fish feed, along with a proposed maximum annual increase up to a total maximum annual discharge ceiling.

88. Modelling would determine whether any increase beyond the maximum initial annual discharge could proceed.

89. The appellant's concern arose over the effects of feed to the salmon introducing a new nutrient source to water in the Marlborough sounds through fish waste, increasing its 'trophic' state. The Board of Inquiry had observed that should the Marlborough Sounds reach a "eutrophic" state that would represent an "ecological disaster".

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[57] Section 64.

90. The (majority) expert opinion before the Board however, reached as a result of conferencing, was that a change in the water column to a eutrophic state from the establishment of the salmon farms was unlikely.

91. The Board of Inquiry nevertheless recorded that it was "somewhat astounded" at the lack of modelling of the total maximum (rather than just maximum initial) discharges, and also stated that it did not have an adequate description of the *existing environment*, resulting in considerable uncertainty as to 'the ability of the Sounds to assimilate a significant increase in nutrients adequately'.[58]

92. The Supreme Court decision reveals that some of the uncertainty the Board of Inquiry had been troubled by was to be cured by conditions of consent relating to baseline monitoring.

93. These conditions included a requirement for a "baseline plan" overseen by a peer review panel, and culminating in a "baseline report" containing the results from monitoring and analysis undertaken in accordance with the baseline plan, before structures could be placed on the farms.[59]

94. If the baseline plan itself was not approved by Council then the consent was to lapse, and if the baseline report was not approved, no structure could be placed on the marine farms.[60]

95. In effect therefore, while having been granted, the consent holder would not get past 'first base' in terms of implementation without these reports being prepared and approved, post consent.

96. A consent condition of that kind naturally sails very close to frustrating the exercise of a consent and conditions of that kind have been found to be invalid (as noted earlier in this paper).

97. On the other hand, the approach is in line with that endorsed by the High Court in *Director-General of Conservation v Marlborough District Council,* whereby a consent condition can legitimately preclude *"the ability of an applicant to carry out the activities permitted by the consent"*.[61]

98. A distinction appears to be being drawn then within the case law as between conditions which would *necessarily* frustrate a consent from being implemented (which is invalid), and those which, *depending on the outcome of monitoring and evaluation*, might prevent further exercise or expansion to fully utilise the permit in question (which is valid).

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[58] Refer paragraphs [46] and [56] of the Supreme Court's decision.
[59] Paragraph [88] of the Supreme Court's decision.
[60] Paragraph [89] of the Supreme Court's decision.
[61] Paragraph [17] of that decision.

99. Beyond the baseline phase of investigation, the marine farm permits at issue in the *Sustain our Sounds* case involved further "feedback" loop investigations, for example whereby before there could be any increase in current feed levels (towards the total maximum proposed, and beyond the initial maximum), three years of assessment is required to demonstrate that there has been no statistically significant difference in terms of 'enrichment' from the previous year, and that all environmental quality standards were being met.[62]

100. Only upon approval of an 'annual report 'prepared by an independent person (and peer reviewed) recommending an increase, could there be any increase in the tonnage of feed from that point.[63]

101. In the event that water quality issues arose, the amount of feed might need to be reduced and in more serious circumstances, stock removed from the farms until compliance was achieved.[64]

**Board of Inquiry Decision**

102. Against that background, the Supreme Court considered, first, the Board of Inquiry's synthesis of the requirements for adaptive management (including relative to the case law traversed earlier in this note), and stating as follows:

> On the basis of those cases, the Board considered that, before endorsing an adaptive management approach in this case, it would have to be satisfied that:
>
> (a) there will be good baseline information about the receiving environment;
>
> (b) the conditions provide for effective monitoring of adverse effects using appropriate indicators;
>
> (c) thresholds are set to trigger remedial action before the effects become overly damaging; and
>
> (d) effects that might arise can be remedied before they become irreversible.[65]

103. Note the use of the *future tense* (there *will be* good baseline information) in point (a).

104. An interesting feature of the case relative to point (c) is that the applicants proposed a mechanism involving "*qualitative water quality standards*" (a phrase that only lawyers could devise!), for want of specific *quantitative thresholds* or management triggers available at the hearing stage.[66]

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[62] Paragraph [90] of the Supreme Court's decision.
[63] Paragraph [91] of the decision.
[64] Paragraph [92] of the decision.
[65] Paragraph [105] of the decision.
[66] Paragraphs [77] to [80] of the Supreme Court decision.

105. Ultimately, quantitative water quality standards would be determined and approved by Council through a peer review panel mechanism, through which the thresholds for expansion, or more intensive monitoring and any "cutback" response, would be derived.

106. One of the key objectives in that regard set by the Board was that there be no significant movement along the trophic state scale in terms of water quality (i.e. something less than the extreme scenario of ecological disaster must trigger action).[67]

**International Perspectives**

107. Building on the Board's outline (requirements for adaptive management as set out above), the Supreme Court first considered the Department of Conservation's guidance notes dealing with the precautionary approach referenced in policy 3 of NZCPS 2010. The guidance notes state that it will be a matter for local authorities to decide on a "case-by-case basis" whether an activity should be avoided until sufficient study has been done, or whether an activity can be allowed subject to "*complex and detailed conditions and a programme of specified testing and monitoring (as in adaptive management)*".[68]

108. The guidance note goes on to state that an adaptive management approach will not be appropriate where it "*cannot remedy effects before they become irreversible*".[69]

109. This is consistent with the "acid test" as we put it earlier in this paper.

110. The Supreme Court then considered International Union for Conservation of Nature (**IUCN**) guidelines on the application of the precautionary principle, and as to the use of an adaptive management approach, which the guidelines state should be used *"unless strict prohibitions are required"*.[70]

111. This 'presumption' in favour of adaptive management has a parallel with the provisions of s61 of the EEZ Act as noted earlier.

112. Of interest also the Supreme Court records recognition in the IUCN guidelines that the precautionary principle may require prohibition of activities where *urgent measures* are needed to *overt imminent potential threats*, where the potential damage is likely to be *irreversible* and where *particularly vulnerable* species or ecosystems are concerned.[71]

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[67] Paragraph [81] of the decision.
[68] Paragraph [108] of the Supreme Court decision.
[69] Paragraph [108] of the Supreme Court decision.
[70] Paragraph [109] of the Supreme Court decision.
[71] Paragraph [111] of the decision.

113. The IUCN guidelines suggest a relatively tolerant approach to application of adaptive management responses, reserving refusal (prohibition of activities) for imminent, irreversible and particularly vulnerable effects and species impacts.

114. The Supreme Court then referred to the Environment Court line of authority outlined earlier in this paper, before touching on Australian and Canadian cases.

115. A point made in the Australian authorities cited by the Supreme Court is that the more significant and the more uncertain the threat, the greater degree of precaution required, along with the approach that "some margin for error" should be retained through adaptive management, "*whereby the development is expanded as the extent of uncertainty is reduced*".[72]

116. This is an interesting point; suggesting suitability of the approach where adaptive management allows activity to expand in a manner 'inversely proportional' to the extent of uncertainty over time.

117. Another Australian authority was cited to the effect that adaptive management is not a "suck it and see" trial and error approach, but instead an "*iterative approach involving explicit testing of the achievement of defined goals*".[73]

118. Also of interest is an observation of the Canadian Federal Court of Appeal that adaptive management responds to the difficulty of predicting the effects of a project, and counters the "*potentially paralysing effects of the precautionary principle on other socially and economically useful projects*".[74]

119. The Court also referred to Canadian authority that:

> ...adaptive management allows projects to proceed, despite uncertainty and potentially adverse environmental impacts, "based on flexible management strategies capable of adjusting to new information regarding adverse environmental impacts where sufficient information regarding those impacts and potential mitigation measures already exists".[75]

**Supreme Court's Findings**

120. Against that traverse of local and overseas authority the Supreme Court concluded:

> [124] The issue for the Court is when an adaptive management approach can legitimately be considered a part of a precautionary approach. This involves the consideration of the following: **what must be present before an adaptive management approach can even be considered and what an**

[72] Paragraph [118] of the Supreme Court decision.
[73] Paragraph [121] of the Supreme Court decision.
[74] Paragraph [122] of the Supreme Court decision.
[75] Paragraph [123] of the Supreme Court decision.

**adaptive management regime must contain in any particular case before it is legitimate to use such an approach rather than prohibiting the development until further information becomes available**.

[125] As to the threshold question of whether an adaptive management regime can even be considered, **there must be an adequate evidential foundation to have reasonable assurance that the adaptive management approach will achieve its goals of sufficiently reducing uncertainty and adequately managing any remaining risk**. The threshold question is an important step and must always be considered. As Preston CJ said in *Newcastle*, adaptive management is not a "suck it and see" approach. The Board did not explicitly consider this question but rather seemed to assume that an adaptive management approach was appropriate. This may be, however, because there was clearly an adequate foundation in this case.

121. The Supreme Court went on to consider the essential issue put to it by the appellant, stating as follows:

[129] The secondary question of whether the precautionary approach requires an activity to be prohibited until further information is available, rather than an adaptive management or other approach, will depend on an assessment of a combination of factors:

(a) the extent of the environmental risk (including the gravity of the consequences if the risk is realised);

(b) the importance of the activity (which could in some circumstances be an activity it is hoped will protect the environment);

(c) the degree of uncertainty; and

(d) the extent to which an adaptive management approach will sufficiently diminish the risk and the uncertainty.

The overall question is whether any adaptive management regime can be considered consistent with a precautionary approach.

122. Ultimately, and on the evidence, the Supreme Court upheld the Board's application of the adaptive management framework.

123. While noting that there was a lack of baseline information and stating "normally one would expect there to be sufficient baseline information before any adaptive management approach could be embarked upon (as against prohibition until any deficiency in baseline information is remedied)",[76] this would be remedied through the baseline report structure and requirement before any of the farms were stocked.

[76] Paragraph[ 135] of the decision.

124. A key consideration was that while the gravity of risk if realised (ecological disaster) was grave, on the information of the majority of the experts, such a scenario was unlikely with thresholds set to trigger remedial action before the effects become overly damaging.[77]

125. Of interest in this context is the decision of the Environmental Protection Authority in relation to the Trans-Tasman Resources (Seabed Mining) application.

126. Referring to s61 of the EEZ Act as the "lens" through which it must assess any proposal, the EPA nevertheless determined that the proposal failed the adaptive management requirements, including as set out by the Supreme Court in its decision (recorded above).

127. The primary issues were a lack of baseline monitoring, and that TTR was not proposing an approach that would enable commencement of the activity on a small scale, but to undertake the full project from the outset (contrary to the definition of adaptive management in the EEZ Act).

128. The EPA did not consider in terms of the "importance" criteria the Supreme Court posited, that the proposal was a "must have" in terms of the benefits that it would provide. It was also concerned at the lack of specificity in performance objectives for a triggered response, and the lack of responses in some areas if threshold or trigger levels were exceeded.

**SYNTHESIS**

129. There are obviously two dimensions for consent authorities to consider, namely:

(a) whether an adaptive management approach is open as a route to possibly granting consent in the face of uncertainty about effects?

(b) how to frame the adaptive management requirements to ensure future risk is adequately addressed, and significant irreversible effects avoided ?

130. The Supreme Court decision sets the threshold for the first question and contains important guidance as to the limitations of the approach.

131. In terms of how to best frame consent conditions to ensure effective adaptive management frameworks are ultimately applied, the point stressed by the Environment Court in *Crest Energy* as to the need for certain and enforceable objectives is obviously key, particularly in terms of what any post-consent baseline assessments must reveal, and then beyond that in terms of allowing for progressive expansion of an activity over the term of the consent.

[77] Paragraphs [130] to [134] of the decision.

132. Conversely, certain and enforceable objectives (or thresholds) are obviously essential in order to trigger (without too much scope for debate) the need for remedial and if necessary "claw back" type responses.

133. That both the Board and ultimately Supreme Court upheld application of the adaptive management framework despite the concerns the Board had expressed regarding a lack of information (as mentioned above) demonstrates that collection of baseline knowledge (the first point taken from the *Crest Energy* synthesis outlined above) can itself be a post-consent step, at least to some degree, as was the case under the *Clifford Bay* conditions as ultimately approved by the Environment Court (following referral back from the High Court).[78]

134. As the Environment Court put it in *Crest Energy,* consent applicants need not be placed in the position of having to carry out "all" necessary research before making an application.

## SECURITY INSTRUMENTS

135. We now address the legal mechanisms available to a Council to help ensure consent conditions are complied with, short of any need to take direct enforcement action (infringement notice, abatement action, enforcement proceedings or prosecution).

136. In particular, we discuss what can be described as 'securities', including the use of bonds, consent notices, covenants and memoranda of encumbrance.

137. By way of introduction to the various forms of security, we record (with gratitude) an extract of a publication from Brookfields Lawyers,[79] and penned by a leading authority on the topic – Mr John Sheppard.

> **Importance of Security Documentation**
>
> Securities ensure payment to the council of substantial sums of money, or protect the council from substantial liability. The fact that enforcement proceedings are rarely required should be seen as an indicator of the effectiveness of the security. In our view councils, being accountable to the public, even more than commercial organisations such as banks, should seek satisfactory security documentation.
>
> All manner of security documents are usually prepared by the solicitors for the party taking security at the cost of the party giving security. In the case of council security documents, that practice should be followed, primarily to ensure that there is no conflict of interest, but secondly it reflects the reality of the applicant seeking a financial benefit from the council.

[78] Refer paragraph [75] *Director-General of Conservation v Marlborough District Council* C113/2004.
[79] February 2001 newsletter.

In terms of local government accountability and the requirement for transparency in council transactions, a council should not fail to follow commercial practice. Where there is financial benefit to the applicant any subsidisation of expenses may be seen to be inappropriate. Although council securities may have come to be seen as being routine, there must be caution against becoming complacent as the financial implications might be considerable.

**Bonds - What are they?**

138. A bond is essentially a written promise to comply with conditions of consent, or to pay the bond holder (usually Council) money so that Council can complete the conditions if the consent holder fails to do so. A bond needs to be in writing and set out the obligations that need to be complied with, establish a financial amount that is payable to the Council in the event of default, and in most cases provide a guarantor.

**When are they used?**

139. There are two main times a bond requirement arises:

(a) To secure compliance with conditions of consent under sections 108 and 220 of the RMA.

(b) To secure compliance with conditions of consent following issue of 224(c) certification for a subdivision. This is important because once Council provides 224(c) certification, titles can issue and land sold to new owners. If there is work required by the subdivision consent that is uncompleted at that time, Council need to either secure compliance by way of a consent notice or a bond.

There are good reasons why some conditions are not fully complied with prior to 224(c). Common examples include:

(i) The obligation to seal an access road. Sometimes sealing work is impracticable before construction of houses because heavy vehicle use will likely ruin the surface. Often it makes more sense to seal the road after construction.

(ii) Landscaping conditions can be subject to a bond to be completed following construction.

(iii) Bonds can be useful to secure compliance with ongoing obligations that continue after title is issued. For example to secure compliance with restoration planting, pest clearance, monitoring conditions or the like.

140. Where conditions require actual money to be spent to comply, a bond should be seriously considered to ensure compliance. This is particularly the case when the obligation may fall to a new owner, who may well see subdivision obligations as being the responsibility of the developer.

141. Where a restriction on activity is involved, then a consent notice is probably suitable, to provide notice to a new owner of the restriction applying to their land.

**Statutory provisions for bonds**

142. The starting point for bonds is usually conditions in the consent stipulating a bond. Section 108(2)(b) and section 108A are relevant. They set the framework for bond conditions in a resource consent. Points to note are:

(a) A bond is security for the performance of one or more conditions of the consent.

(b) There is statutory authority for the Council to enter the land to check on compliance and to complete the bonded work if the consent holder defaults.

(c) The bond may continue after the expiry of the consent. This is particularly important where the consent is a water or discharge permit which is finite (or, more unusually, a land use consent is for a fixed term) but where the effects of activities carried out during the term of consent may subsist after that, either for a period or indefinitely.

(d) The bond conditions can require the bond to be given before the consent is exercised.

(e) There can be provision for the bond to be secured over land (although this is seldom done because bonds are usually provided either by way of cash deposit or by a financial institution). When registered on land, a bond is deemed to be a covenant, and binds successors.

(f) The conditions can provide that the consent holder's liability is not limited to the amount of the bond (and should).

(g) The bond can extend beyond ensuring compliance with the conditions of the consent, to deal with any adverse effects that can become apparent during or after the expiry of the consent.

(h) The bond should state how demand is to be made by the Council on the surety for payment (i.e. where a cash deposit is not held, as discussed below).

(i) The conditions can require security, including by a guarantor.

(j) The conditions can state the bond can be varied, cancelled or renewed by agreement between the holder and the consent authority.

**Consent conditions need to spell out very carefully and precisely:**

(a) What is to be bonded.

(b) When the bond is to be provided, i.e. before works commence, before a building is constructed etc.

(c) The amount of the bond, or how the bond quantum is to be fixed.

(d) How the bond quantum is to be reviewed.

(e) What the essential terms of the bond are to be.

(f) That the form, content, guarantor and quantum must be acceptable to the Council.

(g) What happens on transfer of the consent.

143. The form, content and availability of bonds from trading banks can change over time. The best form of bonds are usually the simplest: either cash up front or a simple bond provided by a bank (or other reputable financial institution) that provides "*you ask, we pay*".

**Terms of a bond**

144. A bond needs to clearly set out the obligations of the person giving the bond. These should mirror the relevant consent conditions that need to be complied with. Often these are in a schedule to the bond.

145. The bond needs to record an obligation on the giver of the bond to comply with those conditions.

146. The bond secures performance by either payment of cash, to be held by Council, or the promise by a guarantor to pay cash in the event of default.

147. The bond needs to authorise Council to complete the work in the event of a default using the bond money. Often the bond will record that money unspent is returned to the bond giver or (conversely) funds incurred by Council in excess of the bond amount are a debt due to the Council.

**Dealing with a cash bond**

148. Sometimes cash is offered, to be held as a cash bond.

149. A cash bond needs to be receipted and held on trust for the particular purpose for which it is paid. A cash bond should be put on an interest bearing savings account In a trust account. A cash bond needs to be supported by a signed bond agreement setting out the details of the conditions, along with the obligations and rights of Council to complete the work as described above, utilising the bond money.

**Role of the guarantor / surety**

150. If a cash bond is not provided, it is common practice to obtain a bond where the consent holder undertakes to carry out the work, or if that is not achieved then the bond is to be paid. The payment of the bond needs to be secured by a guarantor (surety). Common practice is to require the guarantor to be a registered trading bank of New Zealand.

151. It is common practice for a bank to sign the bond form as a guarantor under delegated authority. The guarantee needs to provide:

(a) That the bank guarantees payment of the bonded amount upon default of the developer.

(b) The bonded sum will be paid to the Council upon written notice.

(c) That bonded sum is paid without regard to, and despite any instruction to the contrary from the consent holder.

(d) The guarantee normally provides that the bank's liability is fully satisfied if the work set out in the bond is completed, or if the bonded sum is paid to the Council.

**Collecting a bank bond**

152. The practical side of collecting a bank bond is relatively straightforward. If acting for a Council you should ask the bank who will be dealing with the payment of the bond. Once that person is identified then write to the bank along the following lines:

(a) Advising that on behalf of the Council you are writing to require payment from the bank under the terms of the bond.

(b) Attach a copy of the signed bond.

(c) Refer to the relevant provisions of the bond that require the bank to pay as guarantor.

(d) Request payment of the bond sum.

(e) Provide bank account details for the bonded sum to be paid into.

153. Usual practice is that registered trading banks will make payment in a matter of days after receiving demand under a bond along these lines.

154. The bonded amount then needs to be receipted and is able to be used by the Council to organise contractors to complete the work under the terms of the consent.

155. This can be a useful time to invite the consent holder one final time to complete the necessary work themselves, before arranging to have the work done for them using the bond money.

**Other sureties**

156. If a guarantor other than a registered trading bank is proposed, then the Council needs to weigh up the increased risk to it of having an entity other than a registered trading bank stand as guarantor. There are other providers in the market that issue bonds. Examples include some insurance companies, and also overseas banks. Some due diligence will be needed as to their financial security, reputation and track record when assessing the potential risks. Other important considerations to manage risk include the length of time the bond may be required for, and the amount of the bond.

**Pitfalls and traps**

*Finite term*

157. For Councils it is important to avoid bonds that expire shortly after consent compliance is expected. This creates a risk that compliance with the bond and deadlines are not actively monitored and the bond may expire before compliance with the consent is achieved or confirmed. If you have a bond that has a finite term, the underlying conditions need to be actively monitored to ensure that compliance is achieved prior to the deadline, or that the bond is called in prior to it expiring. Once a bond has expired, that is the end of it.

158. Often the time when a bond is most needed is when a development is not proceeding as anticipated, or there are financial difficulties. Often promises of compliance come and go and timeframes can drag on. Therefore finite terms do create high risk for Council and really do require the bond to be called in prior to it concluding.

*Bonded sum is inadequate*

159. Care is required to establish a bond for an amount that adequately covers the work to be completed. The bonded sum needs to be supported by credible quotes for the actual work. A contingency is always good practice to ensure that inflation, delays or price escalations are factored in. A good rule of thumb is a bond should be for cost plus 25-30%.

160. If the Council has a bond that is insufficient to cover the work, in the worst case scenario then the Council is put at risk of having to complete the work using what bonded sum there is, and then consider how the rest of the work is to be funded (if at all). A worst case scenario is that the Council funds the balance of the work itself, to ensure the consent conditions are complied with to avoid allegations of negligence. This can particularly occur if a developer is insolvent. The ratepayer ultimately bears the cost under this scenario.

161. An alternative is that the Council is left to complete what work it can using the bonded sum it has available to it. This leaves the balance of the consent conditions uncompleted. This is of course unsatisfactory.

162. The longer the project, the more conditions, and the higher the bonded sum, the greater the risk of the bonded sum being eroded by cost escalations and contingencies. In a complex situation a quantity surveyor report may be required to provide assurance the bonded sum is correct and an appropriate contingency has been applied.

**Types of conditions to secure**

163. A bond at its most basic provides Council with money to complete work. A bond should only be aimed at securing compliance with conditions that Council can step in and complete, preferably as a one off.

164. A bond is not satisfactory for conditions that require ongoing work or long term involvement on the site. The "rule of thumb" is that Council needs to instruct their contractor to go on and complete the work using the bonded sum to conclude the bond. Care needs to be taken to consider whether the conditions that are to be secured by the bond are capable of completion by Council using the bonded sum.

165. Examples of the types of conditions that are not suited to a bond would include obligations such as preparing management plans, locating a dwelling within a particular building platform, or avoiding adverse effects on particular parts of the environment, such as retaining indigenous vegetation.

**Consent Notice**

166. For conditions that restrict land use, such as those just mentioned above, a consent notice is the most suitable security binding future owners.

167. A consent notice is required by Council to be registered on future titles as part of issuing section 224(c) approval to a subdivision plan. The consent notice is deemed a covenant. It is registered on the specified titles, and binds future owners. It also serves to notify future owners of an on-going obligation relating to the land. Common examples of the types of conditions suited to a consent notice include:

(a) Requiring future buildings / dwellings to be located in a specified building platform on the site;

(b) Restrictions on buildings such as height, colour, etc;

(c) Requirements to maintain planting; and

(d) Requirements to not construct structures in hazard prone areas, e.g. near the coast, areas prone to flooding or in rockfall prone areas.

**Template**

168. Attached as Appendix A is a generic bond template that covers many of the issues raised above.

**Encumbrance (Memorandum of Encumbrance / Rent Charge Agreement)**

169. The purpose of an encumbrance is to register obligations on a certificate of title.

**Background**

170. In New Zealand land law covenants agreed between two parties that do not benefit land (in gross) are not enforceable. Therefore lawyers have created a Memorandum of Encumbrance mechanism as an alternative to a covenant. These are also known as a Rent Charge Agreement. They create a "mortgage" over property that enables the restrictions contained in the agreement to be registered on the relevant title. By doing so this enables:

(a) Notice of the restrictions to be on the title warning future purchasers; and

(b) The restrictions become binding on future purchasers of the land.

171. While s108(2)(d) of RMA gives councils specific statutory authority to impose a condition requiring a covenant to manage land use, the same power does not arise under section 220 in relation to subdivisions (as discussed further below). This means sometimes the use of an encumbrance instrument is still used for subdivisions, but more often between an applicant and a submitter to secure rights and obligations where a covenant will not work.

172. There is no power for a consent authority to require an encumbrance. Often they arise because they are volunteered by an applicant, or negotiated with a submitter to deal with an environmental effect.

**Essential criteria**

173. An encumbrance is a contract between the landowner and any other third party, usually the Council.

174. It sets out the positive or restrictive obligations on the landowners. Those restrictions can be tailored to the particular circumstances and set out how the land can or cannot be used.

175. The encumbrance sets out an obligation on the landowner to pay an amount of money in the event of failure to comply with the restrictions on the use of the land. This amount of money can be:

(a) A large amount to operate as a financial disincentive to breach the terms of the agreement (e.g. $1,000 per week in the event of a breach); or

(b) A nominal amount to be simply a device to create the encumbrance (e.g. $1 if demanded).

176. Once signed and registered the encumbrance obliges the landowner to comply with its terms.

**Legal implications**

177. The agreement to pay money in the encumbrance creates a mortgage. This enables the restrictions to be registered on the title to the property. It is important to understand that the encumbrance is therefore enforceable as a mortgage. This means that breach of the agreement is a dispute that needs to be resolved in the civil courts. An action can be taken in the District Court seeking an order for specific performance requiring compliance with the terms of the agreement.

178. The Property Law Act 2007 also implies a range of terms in any mortgage[80]. One such implied term is that if the terms of a mortgage are breached then there is a power for the beneficiary of the mortgage to sell the land[81].

179. To avoid this implied power, the encumbrance must specifically set out a contrary intention[82].

**Binding future owners**

180. Because an encumbrance operates in the same way as a mortgage, if the land is sold subject to the encumbrance then the future owner is also subject to the obligations in the encumbrance[83].

181. This is one of the key functions of an encumbrance to provide notice, and to bind future owners of land.

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[80] Section 95 Property Law Act 2007
[81] Clause 13 of Part 1, Schedule 2
[82] Section 95(2)
[83] Section 203

**Commentary**

182. An encumbrance is a reasonably well recognised and enforceable technique to place restrictions on a certificate of title.

183. It is slightly clumsy as it creates a mortgage and establishes a payment obligation in event of a breach. The benefits of it are that the terms can be specifically tailored to the circumstances, it is registered on the title and so will bind successive owners.

184. The disadvantage is that enforcement of it can be costly and time consuming requiring an action between the parties in the civil courts. Normal RMA enforcement techniques such as an abatement notice or an enforcement order cannot be relied on to enforce an encumbrance (unless the breach also breaches conditions of consent). The Property Law Act 2007 does imply a range of terms on an encumbrance which should be understood and specifically excluded if these are not relevant to the particular circumstances of a case. Generally speaking an encumbrance in favour of the Council would not normally want to have implied in it the ability for Council to sell the land in the event that the covenant is not complied with. Rather, the encumbrance is seen as the technique to register restrictions on the title giving future purchasers notice and requiring them to comply with the particular obligations.

**Validity**

185. The Court of Appeal has determined that a Memorandum of Encumbrance is an enforceable document that validly creates a mortgage which binds successive owners of a property[84]. Prior to this decision there had been a number of decisions questioning the validity of an encumbrance. Thankfully that debate has been resolved by the Court of Appeal.

**Template**

186. Attached as Appendix B is a generic template for information. Any encumbrance needs to be specifically tailored to suit a particular situation.

**Covenants**

187. A consent notice (which has the effective of a covenant) is of course not available in the case of the land use consent. The land use equivalent is the covenant mechanism itself as provided for under s108(2)(d) of RMA, which enables a consent authority to impose:

> In respect of any resource consent (other than a subdivision consent), a condition requiring that a covenant be entered into, in favour of the consent

[84] *ANZCO Foods Waitara Ltd v AFFCO New Zealand Ltd* CA181/04 (See paragraphs 50-52 and 121 where it was decided that a Memorandum of Encumbrance is a mortgage and is registrable becoming enforceable under the Property Law Act 2007 with the usual remedies of a mortgagee.)

authority, in respect of the performance of any condition of the resource consent (being a condition which relates to the use of land to which the consent relates).

188. Notwithstanding the restriction in s108(2)(d), at least on the face of the provision and appearing to exclude the ability to impose covenants in the context of a subdivision consent, the High Court has upheld the application of covenants in that context (for the protection of vegetation, and in relation to weed and pest management).[85]

189. A covenant is in essence a contractual arrangement borrowed from the private law realm.

190. A review of case law under RMA reveals that covenants imposed against the will of the landowner are rare. Consent notices (that have the effect of a covenant),[86] are frequently imposed (and indeed obligatory for conditions that apply on a continuing basis) in the subdivision context, but not covenants *per se*. Covenants in a land use consent context are generally volunteered by the applicant in question.

191. Section 108(2)(d) of RMA nevertheless has its place in the scheme of the Act. For example, and in addition to the "no complaints" covenant scenario associated with reverse sensitivity, land use covenants have been applied in a limited range of situations, for example where volunteered by an applicant, to:

(a) Preclude further development within a property being subdivided, including activities that might be permitted by the District Plan (for example see *Upper Clutha Environmental Society v Queenstown Lakes District Council*)[87]

(b) "Assume the risk" associated with development on a hazard prone site, and preclude legal action being taken against the Council in relation to such issues.[88]

192. There might also be a case for a covenant in the *Augier* type situation, to preclude challenge to an undertaking relied on in granting consent, but that might otherwise comprise a condition vulnerable to such challenge. Scenario (a) in the previous paragraph has an element of this dimension to it.[89]

193. That said, and by analogy with case law addressing consent conditions secured by consent notice, a consent authority (including the Court) would not lightly release a consent holder from undertakings that formed an important component of the

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[85] *Morgan v Whangarei District Council* 14 ELRNZ 35.
[86] Section 221(4) of RMA.
[87] W88/2006, paragraphs 173 to 177 in particular.
[88] *Otago Regional Council v Dunedin City Council* [2010] NZEnvC120, paragraphs 76 to 81 in particular.
[89] See *Kirton v Napier City Council* [2013] NZ Env C 66, at paragraphs 55-59.

reasoning justifying approval (*McKinlay Family Trust and Ors v Tauranga City Council)* in any event.[90]

194. Case law also confirms that the Environment Court does not impose an obligation to covenant in favour of a local authority on the basis of speculation, and where other means of addressing the issue in question are available.

195. For example, in *Blueskin Bay Forest Heights Ltd v Dunedin City Council,*[91] the Court rejected a speculative case for imposing a binding covenant on lots proposed through subdivision specifying that no dogs be kept, along with a requested "no complaints" covenant in relation to adjoining farming operations.[92]

196. The Court noted that the provisions of the Dog Control Act 1996 adequately addressed any concerns of an adjoining farm owner as to dogs found attacking stock (with the Court applying the reasoning outlined earlier in this paper, that it must *assume both that the terms of a resource consent will be complied with, and the general law obeyed).*[93]

197. The Court went on to find that the prospect of any legitimate complaints from future owners of the lots associated with the proposed subdivision was remote.[94]

198. Similarly, in *Arkinstall v Wairoa District Council,*[95] the Court rejected a case for a covenant to secure the performance of a condition requiring that a dwelling house on hazard prone land be relocatable. It found that the issue of concern to the Council in that case, being notification to future land owners (warning them of the risks involved) was adequately addressed in other ways.

199. In *Pope v Auckland City Council* [96] the Environment Court imposed a covenant to protect an area of existing Taraire bush.[97]

200. The use of covenants in the RMA context is interesting for the reason touched on earlier in relation to the memorandum of encumbrance technique as an alternative form of security.

201. A covenant of the kind envisaged by s108(2)(d) of RMA is necessarily a covenant "in gross" in that it would be a covenant in favour of the consent authority, rather than in relation to any specific land.

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[90] A119/2008.
[91] [2010] NZEnvC177.
[92] Refer paragraph 65 of the decision.
[93] Paragraph 32 of the decision.
[94] Paragraph 35 of the decision.
[95] A88/98.
[96] A055/09.
[97] Refer paragraphs 50 and 75 of the decision.

202. It would seem obvious that Parliament intended, in providing for such covenants as a means to secure the performance of obligations and consent conditions, that such a covenant would be enforceable for the Council's part.

203. By contrast, the Property Law Act 2007 (s306 in particular) does not disturb the common law in relation to covenants in gross, in providing for both positive and negative covenants to otherwise be enforceable where they are for the benefit of dominant land (and contain either positive or negative obligations relative to the servient land) rather than in gross.

Department of Conservation
*Te Papa Atawhai*

* Sent to NRC + Martell 27/10.

20th October 2020

Northland Regional Council
Stuart Savill
StuartS@nrc.govt.nz

Dear Stuart,

DOC Comments - Technical review of MWWUG proposed trigger levels

Thank you for providing the Department of Conservation (DOC) an opportunity to review the proposed trigger levels (TLs) for the Motutangi Waiharara Water User Group (MWWUG) water permits.

Dr Hugh Robertson and I on behalf of DOC have reviewed the technical report by Brydon Hughes (LWP) dated 16 September 2020. The report is well presented and clearly describes the proposed approach to revising groundwater, electrical conductivity, saline intrusion and wetland water level triggers.

Of particular interest to DOC is the methodology for setting groundwater and wetland TLs. We understand that:

- For 'shallow sand' monitoring bores, TL1 is established on the basis of the minimum groundwater level observed during the 2019-20 summer, with an allowance of between 0.2 and 0.5 metres for longer-term inter-annual variability. TL2 is set 0.1 m below TL1.

- For shell-bed monitoring bores TL2 is based on the groundwater level required to maintain the saline interface below the underlying basement rock contact, calculated using the Ghyben-Herzberg relation. TL1 is set at a level 0.2 m above TL2.

- For wetland water levels, TLs are based on the ~maximum daily recession measured over the monitoring period (as opposed to the relative water level trigger outlined in the GMCP).

Appropriateness of Groundwater Trigger Levels

*Shallow-sand TLs (shallow monitoring bores)*

Section 2.2.2 of the GMCP states the purpose of setting TL1 is to establish 'whether the parameter of concern is approaching outer limits of baseline data'. For the shallow sand monitoring bores this means TL1 should indicate when groundwater levels are *approaching* the outer limit, they should *not be set at the outer limit*. That is, TL1 should not equal or exceed the minimum groundwater level observed during baseline monitoring.

It was proposed in the GMCP to base TL1 on the median groundwater level ±2 times the standard deviation, or some other criteria determined with agreement of Council. It was proposed in the GMCP to base TL2 on the median groundwater level ±3 times the standard deviation, or some other criteria determined with agreement of Council.

The revised TLs have not followed the approach recommended in the GMCP. Instead the TLs for shallow monitoring bores[1] have been set outside the range of baseline data.

For example, at the Kaimaumau Rd (shallow) monitoring bore the proposed TL1 is 1.10 m asl and the proposed TL2 is 1.00 m asl. However, the minimum groundwater level observed in summer 2019/20 was only 1.28 m asl. Therefore the TLs are outside of the limits of the baseline data. This approach is not consistent with the intent of the GMCP.

Given the summer 2019/20 period coincided with a significant drought of record in Northland when groundwater levels were observed to be considerably lower than the previous summer period[2] we do **not support** setting TL1 and TL2 below the minimum groundwater levels.

The consequence of setting TLs below the minimum groundwater levels observed in 2019/20 is it will potentially allow for groundwater extraction to deplete the shallow groundwater resource to a level greater than that observed in a relatively extreme climate event[3]. The total rainfall at Kaitaia during summer 2019/20 was the 2nd lowest recorded since records began in 1948.

**It is recommended to amend TLs for the all shallow sand monitoring bores to be consistent with the intent of the GMCP.** Specifically, TL1 and TL2 should refer to the median observed water levels (± an appropriate variance calculation, e.g. ±2 s.d. for TL1), and must not equal or exceed the minimum groundwater level recorded during the 2019/20 summer period.

*Shell-bed TLs (deep monitoring bores)*
We do not have any comments on the proposed TLs for the shell-bed monitoring bores.

Appropriateness of Wetland Trigger Levels
Monitoring of wetland surface water levels is an important component of the GMCP. The monitoring ensures that any potential or actual effects of groundwater extraction on the significant values of the Kaimaumau-Motutangi wetland system are detected and can be responded to.

The GMCP sought that TLs for the wetland monitoring sites be set with reference to a 'relative water level'. Based on available monitoring data we agree with the LWP report that it is difficult to define a reference water level against which depletion effects can be examined at this stage. Although with continued monitoring definition of the natural range of minimum wetland water levels will be possible.

In the current absence of a longer-term dataset the proposed approach to define TLs based on the daily recession rate (in mm/day) is supported. Monitoring changes in the recession rate will indicate when the drawdown of water levels is exceeding natural observed drawdown rates.

[1] NRC Kaimaumau Rd, Norton Rd, Motutangi Sentinel
2 For example, NRC Kaimaumau Rd monitoring bore
3 https://niwa.co.nz/sites/niwa.co.nz/files/Climate_Summary_Summer_2019-20_NIWA.pdf

Figure 18 of the LWP report presents data on the observed recession rates during the 2019/20 summer period. During this drought period the maximum recession rates were ~7 mm/day and it is assumed that since groundwater extraction was in Stage 1 there were limited effects of groundwater extraction[4].

The revised TLs for wetland water levels are:

- 7 mm/day for TL1
- 8 mm/day for TL2

These TLs ~equal or exceed the outer limit for water level recession observed in Kaimaumau-Motutangi wetland, during a relatively extreme climate (drought) event. This approach is not consistent with the intent of the GMCP.

If future groundwater extraction (e.g. under Stage 3 or Stage 4) were to contribute to water level recession >6.5 mm/day, and mirror drought conditions, this would indicate significant hydrological stress on the wetland system. Consequently, our view is TL1 and TL2 have been set too high.

**Based on the data presented in Figure 18 we propose the wetland TLs are amended to: 6 mm/day for TL1 and 7 mm/day for TL2**

Wetland monitoring

In addition to the comments above relating to TLs, some improvements to wetland monitoring are also required. Specifically:

- Telemetry: The wetland monitoring sites are not telemetered. This is a critical issue and needs to be urgently resolved because evaluation of wetland recession rates (mm/day) is dependent on data being available at least weekly. Telemetry will also address access constraints to the northern wetland monitoring site.

- Northern wetland monitoring site: Two wetland monitoring sites have been established in Kaimaumau-Motutangi wetland, *Wetland South* and *Wetland North*. The LWP report has indicated that monitoring and TLs will be focused on the southern site, until access issues are resolved.

  While the temporal variation in water levels to date has been similar between sites, the northern site is at a lower elevation and has higher likelihood of groundwater connectivity. Therefore, it is much higher priority to maintain monitoring of wetland water levels and set TLs for the northern site.

Kindest regards

Meirene Hardy-Birch
Operations Manager
Kaitaia District

[4] Note: limited analysis was presented in the in the LWP report to confirm this absence of groundwater extraction effects.

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