

Before the Independent Commissioner Hearing Panel

Under the Resource Management Act 1991 (**RMA**)

In the matter of an application by Dunedin City Council to develop a landfill at Smooth Hill, Dunedin.

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**Submissions in reply by Counsel for Dunedin City Council as Applicant**

12 August 2022

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## May it please the Commissioners

- 1 Counsel wishes to respond to the following matters that were raised during the course of the hearing, and have arisen subsequently:
  - (a) DIAL's Counsel's allegation of a threat;
  - (b) Covering of waste;
  - (c) Policy 4.3.5 and reverse sensitivity;
  - (d) Designation;
  - (e) Alternatives and evidence of Mr Keogh;
  - (f) Consultation with DIAL;
  - (g) Reply to Ms Irving;
  - (h) Reply to submissions on behalf of the Royal Forest and Bird Society of New Zealand Inc (**Forest and Bird**);
  - (i) Response to statement of reply of Hilary Lennox for the ORC;
  - (j) Quantitative Public Health Risk Assessment;
  - (k) Waste for Otago - Plan Change;
  - (l) Relevance of New Zealand Coastal Policy Statement; and
  - (m) Consent conditions.

## Overview

- 2 The Smooth Hill site is an excellent site for the location of a new landfill to serve the people of Dunedin. The site has been designated for this purpose since 2004 when the designation was made operative as part of the 1995 District Plan.
- 3 The proposal is for a compact modern landfill that is necessary to deal with the municipal waste produced by the residents of Dunedin. The construction and operation of this landfill will allow Dunedin City to be resilient by assisting to manage the waste produced, in accordance with Council's Waste Futures objectives.
- 4 Any adverse effects of the landfill will be appropriately managed by the design, and the proposed conditions. The conditions have been updated in response to your feedback at the hearing and directions in the Minutes.

The proposed consent conditions are robust and fit for purpose. We ask that you grant the necessary consents on the basis of the further information provided and the proposed conditions.

### **Response to case of DIAL - Alleged threat**

- 5 Mr Page in his oral presentation to the hearing attributed the expert evidence of Mr Shaw to the Applicant and alleged based on the evidence that in some way the Council as a local authority was irresponsibly expressing a threat. This was alleged by Mr Page along the lines that if consent was not granted, the Council would not address the current aviation risk from birds operating at the Green Island landfill when it closes.
- 6 In response it is utterly rejected that the Council (or Mr Shaw for that matter) in anyway has expressed overtly or implicitly that it threatens the Commissioners about your decision that needs to be made, the airport or anyone else. The Council's case is simply that the potential aviation risk can be improved by managing the black back gull population at Green Island prior to the landfill closure. This has been offered as a condition tied to the Smooth Hill landfill consent. That is intended to provide the Commissioners assurance that the opening of the Smooth Hill landfill will not exacerbate the existing bird strike risk faced by the airport, and in fact improves the situation from the status quo. Nowhere has it been stated or claimed that if this consent is not granted that the existing numbers of black back gulls will not be addressed in some way at the closure of Green Island.

### **Covering of waste**

- 7 Condition 43(e) provided for cover within 30 minutes of delivery of special waste. This clearly needs to be amended to refer to "immediately" to align with the methodology that was for burying special waste. This is addressed in Mr Dale's updated conditions, at "Consent B Discharge Waste and leachate to Land Conditions", condition 44.
- 8 In relation to the methodology and the previous Appendix 3, Mr Page suggests that if waste is received from out of district this may be delivered to Smooth Hill without the same treatment procedure (the same point was raised by Ms Irving). This was incorrect. This is already addressed in paragraph 2(b) of the methodology that was set out in Appendix 3 to the conditions provided at the hearing, and is now condition 29(b) to the "Consent B" This expressly requires all general waste from all sources to be processed through the Bulk Waste Transfer Station. This will include any municipal waste from any sources if it is to be taken to Smooth Hill. Any commercial loads not treated through the Bulk Waste Transfer Station may

only be accepted if they too have less than 10% putrescible material as required under a current Waste Acceptance Agreement with DCC.

#### **Policy 4.3.5 and reverse sensitivity**

- 9 It is submitted that reverse sensitivity applies where a sensitive use of land establishes near an existing lawful activity and experiences effects resulting in complaints that may curtail the existing operation. It is pointed out that reverse sensitivity is defined in the partially operative RPS in its glossary at page 135 in the following terms:

**Reverse sensitivity** - The potential for the operation of an existing lawfully established activity to be constrained or curtailed by the more recent establishment or intensification of other activities which are sensitive to the established activity.

- 10 This is not the case here with this application. This is because the proposed landfill is not in any way sensitive to the operations of the airport. Policy 4.3.5(a) is not applicable. However, it is submitted this is not actually a material issue in this case because policy 4.3.5(b) clearly requires significant adverse effects to be avoided on the functional needs of the airport. As Mr Shaw says in his evidence increasing the risk of bird strike should be avoided. The Applicant's case is that it is avoiding increasing the current risk of bird strike.

#### **Designation**

- 11 It is noted in his oral presentation Mr Page indicated that his submissions in relation to overlapping designations did not need to be determined by you. This may well resolve that issue that he has raised.
- 12 In the event that you do wish to determine this issue, our submissions in opening are reinforced. The conical flight protection rules in the airport designation D274 apply to obtaining consent for structures, buildings, aeriels, antennae or other objects "on land" that is covered by the designation. Where such work on land penetrates the surfaces specified in the designation, then permission is required. It is submitted that this restriction on land use does not apply to birds that fly over land at all. Birds or other wildlife are not mentioned at all in the conditions of the designation. To interpret the restriction to apply to birds is clearly unworkable and would put every landowner subject to the conical surface restriction under an obligation to seek prior approval from the airport for any bird that flies over their property at a height that penetrates the surfaces. Clearly that event is unknown until it happens, and unworkable. This implication reveals that Mr

Page's submitted interpretation is not a reasonable one, and if necessary should be rejected.

### **Alternatives and evidence of Mr Keogh**

- 13 The DIAL case seems to assert that there are plenty of alternative landfills to cater for municipal waste from Dunedin City. In response the Council relies on the evidence of Mr Henderson that these options have been looked at but for the reasons expressed in his evidence are not the answer that DIAL or Mr Keogh assert.
- 14 Mr Keogh did explain that the Nash and Ross landfill cannot accept any form of putrescible waste and it is a clean fill disposal site. This is not an acceptable or valid option for disposal of kerbside, municipal waste, hazardous or medical waste, regardless of how low the level of putrescible material can get.
- 15 It is submitted that Mr Keogh despite claiming to be an independent expert provided evidence that was essentially advocating for use of "our landfill", being that operated by Nash and Ross. It is submitted this evidence was completely tainted by this desire, and did not provide any objective assessment of the needs of the City and the available alternatives, including weighing such important factors as the waste minimisation strategy, cultural effects, the relevant provisions of the Regional Policy Statement or any other relevant considerations. This was in addition to claiming both technical and evaluative expertise, and claiming expertise based on the qualifications of an employee. In our submission Mr Keogh's evidence is not able to qualify as independent, nor objective, and is not in accordance with the Code of Conduct for expert witnesses. It should therefore be put to one side and given no weight.

### **Consultation with DIAL**

- 16 Mr Page stated in his submissions that DIAL had not been consulted about the designations for the landfill. His submissions might have left the impression (as it did for the newspaper that reported on this issue) that DIAL was not directly consulted on the Smooth Hill landfill resource consent applications. It is Council's position this is incorrect. The position is outlined in the AEE in paragraph 12.3.6 as set out in full below. This demonstrates that direct consultation with DIAL pre-lodgement occurred in the preparation of the application from 2019, with an obvious focus on bird management.

### 12.3.6 Dunedin International Airport Ltd

DCC commenced discussions with representatives from Dunedin International Airport Ltd regarding the Smooth Hill landfill consenting process in late-2019. Initial meetings provided an opportunity to discuss the project, including the proposed approach to bird management and to exchange relevant information. Key areas of interest included the risks associated with increased bird activity in the vicinity of the airport.

A further meeting was held in July 2020, to update the airport team on the project, the consenting process and timeframes, together with providing details and receive feedback on the draft recommendations from the Bird Management Plan. [Post lodgement further consultation occurred to help inform the development of the draft Landfill Management and specifically the draft Bird Management Plan.](#) There will ~~be~~ [continue to be](#) ongoing engagement with Dunedin International

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Airport Ltd throughout the project ~~and specifically as part of the development of the LMP, and Bird Management Plan.~~

- 17 In terms of the designation for the landfill, this has been included in the District Plan since it was notified in 1995. The same designation was again publicly notified as part of the 2GP on which there were submissions and a hearing. Mr Page did acknowledge DIAL missed the designation process as an opportunity to submit on the designation at both times during its development. This omission by DIAL should not now be visited upon DCC as a problem which Mr Page seems to suggest. Be that as it may, as explained in opening the designation is operative, it cannot be re-visited as part of this hearing, and is intended to be relied on by the Applicant.

#### **Reply to Ms Irving**

- 18 Ms Irving began her clients' case by asserting that the application did not seek the necessary consents under the NES for freshwater management, and therefore the processing of the application should cease and be re-notified or deferred.
- 19 This submission is totally opposed for the reasons that follow.
- 20 Firstly, and most importantly the application was lodged in the knowledge of the NES and expressly identified the regulations that the application contravened and identified consent was required under the relevant regulations. This was identified on page 76 of the application. A copy of this page of the application is annexed to these submissions in full. It is

submitted that the application expressly identified consent was needed under the NES for freshwater management, contrary to the assertions of Ms Irving.

- 21 Secondly, it is also pointed out that Ms Irving was incorrect about her reading of the public notice which she incorrectly identified occurred in 2020. The application was first lodged in August 2020, and was amended in May 2021. Both versions identified relevant regulations under the NES-FM. Following that amendment in May 2021, the public notice was given in September 2021. The public notice outlined the nature of the application and where details of it could be obtained and invited public submissions. The public notice did not seek to identify the relevant rules under which resource consent was sought at all. That detail was contained in the application itself, as referred to above. The public notice has not misled anyone.
- 22 Thirdly, Counsel for the Otago Regional Council submitted that a resource consent authorises an activity, and it does not authorise breach of a particular rule (paragraph 56 of submissions on behalf of Otago Regional Council). This legal position is fully supported. It is the duty on the Applicant to clearly set out and assess the effects of the proposed activity, and the policy framework. It is for the consent authority to decide in this case whether to grant consent for the activity. This means in this particular case that there was no legal duty on the Applicant to seek consent under specified rules. Even if rules are incorrectly identified (which is not the case here), this does not invalidate an application.
- 23 Fourthly, it is submitted that there is no legal basis made out by the submitters that the application is deficient in anyway. Even if it was, which is opposed, in the exercise of your discretion, this is not an appropriate circumstance to defer or suspend processing of this application. This will not elicit any further or new information because all the activities that trigger those consents are already identified in the application and are assessed in the AEE and evidence. Such a delay would therefore be futile, costly and unnecessary.
- 24 It is submitted that there is no substance to the allegation that the resource consent applications were deficient in anyway. It is submitted it is entirely appropriate and valid for the processing of the application to continue.

#### **Reply to submissions on behalf of Forest and Bird**

- 25 Forest and Bird put forward an interpretation that the activity status of the application is non-complying because of the NES-FM. The interpretation submitted by Forest and Bird is that section 43B(7) RMA means that the

intent of this section is to protect an Applicant's position, so long as a notification decision was made prior to the NES being notified in the Gazette.

- 26 In reply it is submitted that this submission by Forest and Bird fundamentally misunderstands the effect of section 43B(7). It is submitted this subsection is intended to ensure that a resource consent that is granted, prevails over the NES, provided the consent was notified before the notification of the NES. This has the legal effect that a granted resource consent can continue to be relied on when it has passed the notification stage, despite the provisions of an NES coming into effect.
- 27 This is a fundamentally different position to this situation for Smooth Hill. Here the Applicant expressly identified consent was needed under the NES-FM when the application was made in August 2020 and amended in May 2021. The Applicant accepts the provisions of the NES-FM are relevant, and consent under it is sought.
- 28 The detail of what was applied for is set out on page 76 of the application. This application directly addressed the activity proposed, and also identified the relevant regulations that applied, being regulations 52, 53, 54, 57 38 and 39 of the NES-FM. This part of the application was amended in track changes in May 2021 when the landfill footprint was reduced. The relevant rules that apply to the current application is analysed by Mr Dale in his primary evidence in paragraph 36. There he identifies the consents needed under the NES-FM for this activity. It is understood Mr Dale's view, relied on by the Applicant, is consistent with the ORC section 42A report prepared by Ms Lennox in her updated report circulated on 24 May 2022.
- 29 Because consent has been sought for the activity, and the relevant regulations of the NES-FM identified, section 88A RMA operates to identify the activity status. This expressly states the activity status of the resource consent is preserved as at the time the application was lodged. This is the case, despite any subsequent changes to plan provisions or any other statutory provision such as the NES-FM that came into effect after the resource consent application was lodged.
- 30 Applying this principle here, the submissions made in opening are reinforced. It is submitted again that the activity status of this application remains discretionary, being the same as it was when lodged in August 2020 (prior to the NES-FM coming into effect on 3 September 2020).
- 31 It is also submitted that this interpretation makes best meaning of section 43B as well as section 88A providing both with effective meaning, rather than as Forest and Bird submit, one section prevailing or overruling another.



It is submitted the conventional principles of statutory interpretation are that both sections are provided meaning where they can be reconciled rather than adopting an interpretation that creates an inconsistency where one section needs to be chosen to prevail over another.

- 32 It is submitted that the application is a discretionary activity and not non-complying as Forest and Bird allege. There is submitted to be no valid reason to suspend or postpone processing of this application.
- 33 Finally, it is submitted that Forest and Bird is raising an overly technical submission, not based on the facts of what is sought by this application, in an attempt to simply derail the hearing process. Full information and assessment of what is proposed is before the Commissioners. No relevant information is missing even if Forest and Bird is correct (which it is submitted it is not). In my submission such a submission from Forest and Bird should be rejected.

#### **Response to statement of reply of Hilary Lennox for the ORC**

- 34 Ms Lennox updated her section 42A report on the last day of the hearing. The conclusion and recommendation is set out and summarised in paragraph 100. This recommends refusal of the application based on three grounds. These three grounds are each responded to below.

##### *Issue 1 – Potential Bird Strike*

- 35 Firstly, Ms Lennox concludes that the actual and potential effects from the proposal (risk of bird strike) are considered on balance to be "significant".
- 36 To reach this conclusion Ms Lennox has rejected the evidence of Mr Shaw and has substituted her own conclusion that the effects are significant. Mr Shaw is the only expert qualified to provide an expert opinion about the risk of bird strike to aviation safety. Nowhere did Mr Shaw advise that in his assessment the effects were significant, in light of the bird management plan that he prepared and the conditions of consent.
- 37 It is submitted that it seriously oversteps the qualifications and experience of Ms Lennox to carry out an evaluation of the risk of bird strike and conclude that the risk is significant. That conclusion is not based on any expert opinion evidence and is not a conclusion that is within Ms Lennox's qualifications and experience as a planner to assess. Ms Lennox has not carried out such an aviation risk assessment and is not able to reach such a conclusion herself.

- 38 As you heard from Mr Dale, his evaluation necessarily relies on the independent technical experts, including Mr Shaw in relation to bird strike risk. This is the correct approach for a planner to adopt rather than to discard independent expert evidence and substitute their own evaluation for the level of risk on a technical issue such as potential bird strike risk to aviation.
- 39 In my submission the uncontested expert evidence of Mr Shaw, being an internationally regarded expert in this specialised area is deserving of paramount weight in this application. To the extent his evidence conflicts with that of Ms Lennox, in my submission the evidence of Mr Shaw should clearly be preferred when evaluating such levels of risk.

### *Issue 2 - RPS*

- 40 The second reason Ms Lennox identifies for her conclusion is that the proposal is contrary to 10 policies contained in the partially operative RPS, the proposed RPS and the Regional Plan Waste. This evaluation principally flows from Ms Lennox's own evaluation of the risk of bird strike.
- 41 In my submission this evaluation is tainted by her assessment that such a risk is significant. It is also pointed out that there is no mention of where the proposal is consistent with the policy framework. This is particularly on important issues such as Te Mana o te Wai, values of manawhenua, potential effects on water quality, wetlands, aquatic and terrestrial fauna and flora. Identifying some policies (10) that the proposal is contrary to is skewed and does not reach a conclusion about whether the proposal is consistent with, or contrary to the overall thrust of the relevant policy framework. It is not appropriate in my submission to reach an overall conclusion by focusing on the provisions the application is contrary to, particularly where that is based on an incorrect evaluation of the level of bird strike risk.

### *Issue 3 – Alternative Location*

- 42 The third and final reason given is that "disposal at an alternate location and additional treatment alternatives could be had regard to". Clearly alternative discharge locations and methods is a matter to have regard to (under section 105). This requires the Commissioners to be satisfied that an appropriate evaluation of alternatives has been carried out by the Applicant, and not to look around to find the best alternative. The principal alternatives evaluated are extending the footprint at Green Island to lengthen the life of the existing landfill, to truck waste out of the district or to construct and operate an incineration plant. These were addressed in evidence by both DCC staff and Mr Ellison on behalf of Te Rūnanga o

Ōtākou. The reasons that those principal alternatives were not pursued have been explained in detail. It seemed to Counsel that in answers to the Commissioners questions Ms Lennox stated that she did not "have a full understanding of all viable options", and as a consequence "could not say that a reasonable assessment of alternatives had been carried out" by the Applicant. It is submitted that this fundamentally applies the wrong test. It is not for the Applicant to satisfy Ms Lennox of a full understanding or assessment of "all viable options". This approach seems to incorrectly put Ms Lennox in the position of wanting to assess the benefits and costs of all alternative options, including their viability and to decide herself whether the Smooth Hill proposal is in fact "viable" and the best out of all of the options available. This misconstrues the assessment under section 105 RMA and stretches well beyond assessing the effects of this proposal, and assessing whether an appropriate assessment of alternatives has in fact been carried out by the Applicant.

- 43 The Commissioners are reminded that the full elected Council considered the principal alternatives, and having evaluated their relative benefits and costs (both financially, but also environmentally, practically and culturally) and determined in their assessment Smooth Hill was the preferred alternative to pursue for consent.
- 44 Overall, it is submitted that the three reasons leading to the conclusion advanced by Ms Lennox all have issues with the methodology used. It is therefore submitted that while it is understandable Ms Lennox was wanting to put forward a recommendation on the ultimate issue, it was premature to do so and the reasons provided are materially flawed for the reasons set out.

### **Quantitative Public Health Risk Assessment**

- 45 In Minute 3, you set out your directions for DCC to commission a Quantitative Public Health Risk Assessment (QPHRA) regarding the potential contamination of the Ōtokia Creek from the discharges of contaminants to land and water for which consents have been sought from the ORC.
- 46 DCC commissioned GHD Limited to prepare an Extended Water Quality Assessment (EWQA) and Quantitative Human Health Risk Assessment (QHRA). DCC lodged the full report containing these assessments with the ORC Hearings Administrator on 20 June 2022.
- 47 The EWQ extended the water quality assessment previously provided by GHD water quality experts to also consider the potential effects of an exceptional failure of the entire HDPE liner over a period of only 50 years,

with a delay of 5 years to implement any mitigation measures. The range of contaminants was also extended to include organic contaminants not typically measured or reported in landfill leachate. The model used to predict downstream surface water quality from the Smooth Hill site, down Ōtokia Creek to Brighton also did not account for natural processes that could mitigate contaminant distribution, so the predictions from the model were very conservative.

- 48 It is noted that evidence of submitters highlighted occasional and, in some cases, regular swimming in Summer in Ōtokia Creek near Brighton Beach. There was no evidence given of daily consumption of food from Ōtokia Creek, or daily watering of hens or livestock from Ōtokia Creek. It is submitted then that the assumptions in the risk assessment are very conservative and valid to rely on.
- 49 The QHRA considered the risks associated with ingesting PFAS compounds via a range of exposure pathways all at the same time such as recreational use of Ōtokia Creek, gathering and consumption of food from Ōtokia Creek, consumption of produce or livestock products watered from Ōtokia Creek. Again, very conservative assumptions were used, with rates of exposure significantly higher than the average person would experience. Even using these very conservative assumptions the hazard index scores for both Brighton, and the pond immediately downstream of the landfill were predicted to be well within acceptable human health thresholds.
- 50 The Qualitative Ecological Risk Assessment (QERA) further evaluated the potential for bioaccumulation in aquatic food chains and found that in the exceptional liner failure scenario the PFOS concentrations downstream of the Smooth Hill site were not likely to result in adverse effects to the aquatic environment.
- 51 Expert commentary on the HHRA was provided by Mr Rumsby of EHS Support Limited, on behalf of the "Brighton submitters group". Mr Rumsby's commentary stated that the QHRA should assess risk for a higher degree of home-grown produce. Further, Mr Rumsby expressed concerns about GHD's bioaccumulation assessment and recommended that GHD undertake a food web-based assessment of bioaccumulation factors. He also expressed concerns about GHD's focus on three PFAS compounds, rather than a larger range of compounds.
- 52 It is submitted that Mr Rumsby's commentary on the QHRA seeks an assessment that is so excessively conservative that it would lead to a completely unrealistic assessment of risk. The QHRA already adopts

highly conservative assumptions by modelling for an exceptional liner failure with no mitigation, and levels of exposure that are above what people can reasonably experience. Mr Rumsby's commentary does not recognise the inherent conservative approach adopted, which was based on a total liner failure. It is submitted that the extremely conservative assumptions recommended by Mr Rumsby would not provide the information that was sought by you when you requested an assessment that would consider the upper bound for a realistic scenario.

- 53 It is further submitted that even if the excessively conservative assumptions sought by Mr Rumsby were adopted, this would not change the conclusions of the risk assessment that the risks to human health associated with an exceptional failure of the landfill liner would still be within the acceptable threshold for human health. Detail on the issues is addressed in the evidence in reply proposed by Mr Kirk. Overall the QHRA provides a high level of assurance that the proposal does not put human health at risk, even using very conservative assumptions.

#### **Regional Plan: Waste for Otago - Plan Change**

- 54 Plan Change 1 (Dust suppressants and landfills) to the Regional Plan: Waste for Otago became operative on 9 July 2022, after the hearing.
- 55 This is now a relevant consideration you should have regard to under section 104 RMA in reaching your decision.
- 56 Under this Plan Change there is a new policy (Policy 7.4.11) that the siting, design, construction, operation and management of new landfills, must be in accordance with the Waste Management Institute New Zealand's Technical Guidelines for Disposal to Land (August 2018); and a site-specific management plan covering leachate management, stormwater capture and control, minimisation of contamination of surrounding environment, and management of hazardous waste, must be prepared and implemented.
- 57 The design of the landfill and conditions of consent offered by DCC meet these requirements.
- 58 The Plan Change also introduced a requirement that discharges from landfills within 13 kilometres of airports that are used for regular air transport services by aeroplanes capable of carrying more than 30 passengers, are to be assessed in order to prevent increasing the existing risk of bird strike.
- 59 There has been detailed consideration of the potential for the proposed Smooth Hill landfill to increase the existing risk of bird strike at Dunedin

Airport, which is located less than 13 kilometres away from the site. The expert evidence of Mr Shaw concluded there will be no increase to the existing risk of bird strike at Dunedin airport if the proposed bird management plan and Residual Putrescible Waste Removal Methodology are followed.

- 60 It is submitted this plan change reflects good practice, and the substance of the new provisions have already been addressed by the Applicant in the application and evidence.

### **New Zealand Coastal Policy Statement**

- 61 In Minute 4 you asked whether the NZCPS is relevant.
- 62 Section 104(b) RMA requires you to have regard to any relevant provisions of a NZCPS. The legal question then turns on whether there are any such relevant provisions.
- 63 Mr Dale has identified in his reply evidence that the provisions that seek to manage the effects of land use activities on a range of values in the coastal environment should be considered as relevant. This includes the preamble, and Policies 3, 4, 11, 13, 22 and 23.
- 64 It is submitted that while these policies are of relevance, they are only peripherally so. The evidence of Mr Dale, drawing on the other technical experts who assess potential effects on water quality, goes on to conclude that the proposal is consistent with these policies which are all effects focused.

### **Consent conditions**

- 65 Mr Dale has worked closely with the relevant experts to re-organise the conditions for consideration. These are attached with Mr Dale's evidence in reply. The changes agreed to by Mr Dale (and accepted by the Applicant) as a result of the feedback from ORC and DIAL is tracked. This is an important aspect of the Applicant's case to identify proposed and offered conditions that frame the application and manage the potential adverse effects of it.

### *Bond Condition*

- 66 DCC is offering a bond condition. This is based on the bond condition used in the consent for the Kate Valley landfill, but adapted with minor changes to the context of the Smooth Hill landfill. The Applicant supports and offers these conditions.

- 67 The bond condition will apply if DCC transfers its consents to another entity in whole or in part.
- 68 The amount of the bond proposed is either the sum of \$5,000,000, or will be set according to cost estimates established via a risk assessment prepared by the consent holder and submitted to ORC prior to the transfer of any consent. The specific costs that must be covered by the bond are listed in the bond condition and include: remediation of any adverse effect on the environment, rehabilitation and closure of the site, and monitoring and management of the site both before and after closure.
- 69 It is submitted that this bond condition is comprehensive and addresses any residual risk of DCC not being in the financial position to remediate any future issues if they arise.

#### *Management of Southern Black Backed Gull Population*

- 70 DCC is also offering a condition, based on the expert evidence of Mr Shaw, requiring that a Southern Black Backed Gull (SBBG) Management Plan be prepared by a suitably qualified person to manage landfill food availability at the Green Island landfill and the breeding success of the existing SBBG population at Dunedin breeding sites.
- 71 This is intended to manage down this population to reduce the overall risk of bird strike in the area of the Green Island landfill, and reduces the risk of SBBG's relocating away from Green Island.

#### *Other amendments to conditions*

- 72 The revised set of conditions are structured by Mr Dale to provide general conditions to be annexed to each of the required ORC consents. They are then structured to focus the remaining conditions on what is relevant to each of the consents.
- 73 By way of overview these address:
- (a) the setting of water monitoring trigger levels;
  - (b) alignment of the waste acceptance criteria with the WasteMINZ guidelines waste acceptance criteria for a class 1 landfill;
  - (c) changes to bird management conditions to clarify that protected bird species will not be targeted for shooting and poisoning; and
  - (d) additions to fire management conditions in response to the questions about ceasing operations on peak fire days. The approach to this is

set out in condition 30 of the general conditions which requires that the active landfilling area must not exceed 300m<sup>2</sup> at any time when the daily fire danger rating for the site is very high, extreme, or very extreme for forestry, as reported by the New Zealand Fire Weather System. This is in conjunction with all the other required fire management conditions such as on-site water and cover, in conditions 59-65 of "Consent B Discharge Waste and Leachate to Land". The Applicant has not gone so far as offering to shut down disposal to land on such days because that would require waste to be stockpiled at either the Bulk Waste Transfer Station, or retained in trucks, pending burial at Smooth Hill. It is assessed the preferable overall approach to manage fire risk from waste is to bury it at a small operating face at Smooth Hill, under close supervision. This is preferable to holding waste exposed to the air at the Bulk Waste Transfer Station or in trucks, where the risk of a fire starting and causing damage is likely to be greater.

- (e) The conditions bring the previous methodology for the Bulk Waste Transfer Station that was in Appendix 3, directly into the conditions. This includes a target of reducing putrescible waste going to Smooth Hill in general waste to less than 10% by weight. This is specified as a target, not a hard limit. This involves the detailed methodology and reporting in condition 28 of the "Discharge Waste and Leachate to Land Consent". This involves separation of putrescible waste at collection source (organic food waste and green waste bins), aligned with education and auditing bins. Then the process requires deposit at the Bulk Waste Transfer Station, screening and sorting before the non-putrescible waste is transported to Smooth Hill. Any contaminated loads are quarantined and treated as special waste, for immediate burial at Smooth Hill. There is proposed to be a detailed annual auditing of this measure and reporting against it. Overall it is submitted that this a clear process designed to achieve the lowest possible putrescible waste going to Smooth Hill.
- (f) The Applicant has proposed in the conditions that any "Highly Odorous Loads" that need to be immediately buried are received from 9-30am (it was previously 10am). This is in condition 7(a) of the "Discharge of Landfill Odour and Dust and Landfill Gas and Flare Emissions to Air" consent. This is to enable on-site preparations for immediate burial to be made in the morning prior to receipt of such a load. Ordinarily such transport loads will be delivered in the morning, and it is considered 9-30am is an appropriate delivery time for such a load to be delivered to site, rather than having to wait until 10am.



*ORC response to updated conditions*

- 74 Ms Lennox provided feedback on the updated conditions on 22 July 2022. The feedback included comments from Ms Lennox, T and T and ORC's compliance team.
- 75 The feedback records the ORC compliance team's aversion to conditions that provide for ORC to "certify" that certain requirements have been met. This feedback was provided in relation to conditions 15, 16, 17 20, 23, 27, 28, 29, 31, 41, of the general conditions relevant to all consents; and conditions 15, 17, 37, 55, and 58 of the discharge to land conditions. In response to each of these conditions the feedback noted that the "ORC compliance team are opposed to the term 'certify', especially in regards to material of a highly technical nature." This raises a legal issue.
- 76 Condition 27 currently provides that the consent holder must submit a design report with specifications and design drawings to the Independent Peer Review Panel for review and then to the ORC for "certification (...)" that it meets the conditions of this consent. Construction must not commence until ORC has confirmed certification."
- 77 The feedback from ORC has suggested that the wording of this final sentence of Condition 27 should be changed to "Construction must not commence until ORC has confirmed acceptance."
- 78 Similar feedback was provided by ORC in relation to Condition 41 where the feedback proposed the following wording: "Prior to adopting the alternative capping design, the consent holder must submit details to the ORC for acceptance."
- 79 The proposed condition as drafted by Ms Lennox provides no criteria for what would be "accepted", and by whom. The condition drafted by Mr Dale provides for a "certification" role – which requires the consent authority to certify that the management plans meet the criteria required by the consent, as approved by the hearing panel. Clearly ORC staff can engage advice or any expert to assist in carrying out this conventional "certifier" role. It is submitted that this is the appropriate role for the ORC, whereas wording proposed by ORC to "accept" plans, would result in an unlawful delegation of discretion to the ORC.

80 The Environment Court recently considered the "extent of certification" in *Wedd v Auckland Council*<sup>1</sup>, stating that:

The fundamental legal principle is that judicial duties cannot be delegated so that a consent authority's power to grant consent cannot be left to an officer's discretion, but it is lawful for an officer to certify that a condition of consent has been complied with. The distinction between a person who is a certifier and one who is an arbitrator or otherwise has a judicial duty is between the role of confirming (certifying) whether the criteria of a condition have been met by the consent-holder and the role of determining what those criteria should be.

81 Similarly, in *Re Canterbury Cricket Assoc Inc* the Environment Court stated in relation to management plan conditions<sup>2</sup>:

While a condition of consent may leave the certifying of detail to another person (typically a Council officer) using that person's skill and experience, the court cannot delegate the making of substantive decisions: *Royal Forest and Bird Protection Society Inc v Gisborne District Council*. See also *Turner v Allison* (1970) 4 NZTPA 104 at 128 where the Court of Appeal held judicial duties cannot be delegated.

82 It is submitted that two options are available for conditions that relate to management plans:

- (a) DCC could simply submit final management plans to the ORC to be retained in ORC's records; or
- (b) DCC could submit management plans to ORC for certification that the management plans appropriately address the criteria in the consent conditions. This is the formula DCC has proposed in the conditions, which is the conventional structure of such "certifier" conditions.

83 Either of these options would avoid unlawful delegation of subjective decision-making to ORC.

84 The Applicant volunteer all the conditions in the final set submitted as part of its application, and invite them to be imposed.

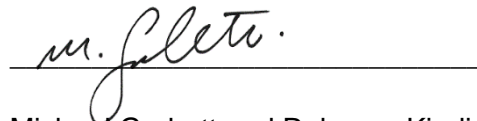
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<sup>1</sup> *Wedd v Auckland Council*, [2020] NZEnvC 82, at [38]

<sup>2</sup> *Re Canterbury Cricket Assoc Inc* [2013] NZEnvC 184, at [25]-[26]

85 Overall it is submitted that the revised set of conditions address the questions raised at the hearing and provide sufficient certainty for you to confidently grant the consents needed.

Dated this 12th day of August 2022

A handwritten signature in cursive script, appearing to read "M. Garbett", is written over a horizontal line.

Michael Garbett and Rebecca Kindiak  
Counsel for the Applicant

## 7.2 Applications for Resource Consent from Otago Regional Council

The Otago Regional Council administers the following relevant National Environmental Standards, and Regional Plans:

- The Resource Management (National Environmental Standards for Freshwater) Regulations 2020 (NESFW), which was gazetted on the 3<sup>rd</sup> of August 2020, and ~~comes~~ came into force on the 3<sup>rd</sup> of September 2020. The NES relevantly controls activities affecting natural wetlands, and the reclamation of rivers.
- The Regional Plan: Waste for Otago (Waste Plan), which was made operative on the 11th of April 1994. The plan controls the discharge of contaminants to land, air, and water associated with landfills and facilities for hazardous wastes.
- The Regional Plan: Water for Otago (Water Plan), which was made operative on the 1st of January 2004. The plan controls the take, use, damming, and diversion of water, other discharges of contaminants to land and water not controlled by the Waste Plan; and drilling of land.
- The Regional Plan: Air for Otago Air (Air Plan), which was made operative on the 1st of January 2003. The plan controls other discharges of contaminants to air not controlled by the Waste Plan, specifically non-landfill related dust associated with the road upgrades.

The NESFW ~~comes~~ came into force on the 3<sup>rd</sup> of September 2020, which ~~is~~ was after the date of the lodgement of these applications. The relevant rules have been considered in the assessment that follows. Where the rules of the NES ~~results~~ resulted in a more stringent activity status for some activities than under the Regional Plan: Water, section 88A of the RMA provides that status of the activities at the time the applications were made (controlled, restricted discretionary, or non-complying) remains unchanged.

Plan Change 1 to the Waste Plan, and Plan Changes 7 and 8 to the Water Plan were called in and notified by the Environmental Protection Authority on the 6<sup>th</sup> of July 2020 and had immediate legal effect from that date. The plan changes do not introduce additional rules or change existing rules that are relevant to the project. The plan changes are currently being heard and considered by the Environment Court.

### 7.2.1 Application of Rules relating to Wetlands and Rivers

For the purposes of the NESFW regulations 37 – 54 the swamp wetland within the site, wetlands within the road upgrade footprint, and the wetlands in the downstream tributary of the Ōtokia Creek are considered to be “natural wetlands”.

For the purposes of the NESFW and Water Plan, it is considered that the watercourses that run through the site are not “rivers” as defined by the RMA, NESFW, or Water Plan. Accordingly, the NESFW regulation 57, and Chapter 13 rules of the Water Plan for activities in the beds of “rivers”

do not apply.<sup>23</sup> Specifically, as outlined in **section 4.3.2**, the watercourses are not perennial and only convey ephemeral flows of water after persistent rainfall. Furthermore, they have no clearly defined bed, have a general absence of natural stream bed substrates, and do not provide any intermittent or permanent habitat for freshwater macroinvertebrate or fish fauna.

The swamp wetland at the bottom of the site, and the defined channel that connects it to the valley floor marsh wetland north of the site may contain some standing water throughout the year and therefore it may possibly come within the definition of “river”. Given that uncertainty, it has been assumed out of caution that the swamp wetland is a “river”, and therefore that the relevant NESFW regulation 57, and Chapter 13 rules have been considered in the assessment that follows.

### 7.2.2 Resource Consents being Applied for

The resource consents that are being applied for each of the proposed project activities, and their activity status, under the relevant rules of the Regional Plans are outlined in **Table 8** below. Components of the project that are a permitted activity, and do not require resource consent are also identified.

*Table 8 – Resource Consents Required from Otago Regional Council*

Activity	Relevant Plan Rule	Commentary
Discharge of waste and hazardous waste onto land within the landfill, and leachate onto land within the landfill that may result in contaminants entering groundwater.	Regional Plan: Waste: Rule 7.6.1 – New or operating landfills – discretionary activity.	Landfills for the disposal of waste, and associated discharges are discretionary activities, requiring resource consent.
	Regional Plan: Waste: Rule 6.6.1 – Operation of facilities for the treatment or disposal of hazardous wastes – discretionary activity.	Facilities for the disposal of hazardous waste, and associated discharges are discretionary activities, requiring resource consent.  Rule 6.6.1 is triggered as compliance with Class 1 waste acceptance criteria will allow some “hazardous wastes” to be accepted – e.g. contaminated soils.
<del>Taking of surface water from:</del> <del>(a) the swamp wetland for the construction of the landfill toe embankment and attenuation basin.</del> <del>(b)(a) roadside wetlands for the upgrading of McLaren Gully Road.</del>	<del>Regional Plan: Water Rule 12.1.5.1 – Taking and use of surface water – discretionary activity.</del>	<del>The taking of surface water for the purposes of draining wetlands is not otherwise provided for in the plan, and therefore is a discretionary activity, requiring resource consent.</del>

<sup>23</sup> The same definition is used in the RMA, NESFW and the Water Plan which is river means “a continually or intermittently flowing body of fresh water; and includes a stream and modified watercourse; but does not include any artificial watercourse (including an irrigation canal, water supply race, canal for the supply of water for electricity power generation, and farm drainage canal).”

Activity	Relevant Plan Rule	Commentary
<p>Taking of groundwater from:</p> <p><del>(a) the swamp wetland for the construction of the landfill toe embankment and attenuation basin.</del></p> <p><del>(b) roadside wetlands for the upgrading of McLaren Gully Road.</del></p> <p>the landfill groundwater collection system.</p> <p>Use of groundwater from the landfill groundwater collection system for non-potable water supply for the landfill facilities.</p>	<p>Regional Plan: Water</p> <p>Rule 12.2.4 – Taking and use of groundwater – discretionary activity.</p>	<p>Permitted activity rule 12.2.2.2 cannot be met, specifically:</p> <p>(a) The take of groundwater will occur within 100 m of the existing wetlands; and</p> <p>(b) The take of groundwater from the <del>leachate groundwater</del> collection system will at times exceed 25,000 litres per day.</p> <p>The taking and use of groundwater is therefore not otherwise provided for in the plan, and is therefore a discretionary activity, requiring resource consent.</p>
<p>Diversion of surface water:</p> <p><del>(a) within the McColl Creek catchment for land drainage.</del></p> <p><del>(a) from the McColl Creek catchment to the Flax Stream catchment for land drainage of 9000m<sup>2</sup> of the landfill site.</del></p>	<p>Regional Plan: Water</p> <p>Rule 12.3.4 – Damming and diversion of water – discretionary activity.</p>	<p>Permitted activity rule 12.3.2.1 cannot be met, specifically:</p> <p>(a) the size of the catchment upstream of the diversion is more than 50 ha;</p> <p><del>(b) there will be a diversion of water to another catchment – the Flax Stream catchment.</del></p> <p><del>Permitted activity rule 12.3.2.2 cannot be met as the diversion of surface water to the Flax Stream catchment could result in a lower level of water in the Ōtokia Creek.</del></p> <p>The diversion of surface water for land drainage is therefore not otherwise provided for in the plan, and is therefore a discretionary activity, requiring resource consent.</p>
<p><u>Damming of surface water by the attenuation basin dam.</u></p> <p><del>by the attenuation basin dam.</del></p> <p><del>(a) for the purposes of wetland creation or enhancement.</del></p>	<p>Regional Plan: Water</p> <p>Rule 12.3.4 – Damming and diversion of water – discretionary activity.</p>	<p>Permitted activity rule 12.3.2.1 cannot be met, specifically:</p> <p>(a) <del>the size of the catchment upstream of the attenuation basin dam is more than 50 ha</del><u>water immediately upstream of the dam is more than 3 metres deep.</u></p> <p>The damming of surface water is not otherwise provided for in the plan, and is therefore a discretionary activity, requiring resource consent.</p>

Activity	Relevant Plan Rule	Commentary
Discharge of stormwater from 9000m <sup>2</sup> of the landfill site to Open Stream (Flax Stream catchment).	Regional Plan: Water  Rule 12.B.1.8— Discharge of stormwater from a reticulated stormwater system to water or land where it may enter water— permitted activity.	The discharge of stormwater is a permitted activity, and no resource consent is required.  All rule performance standards will be met, specifically:  (a) The discharge is not to a regionally significant wetland, and will not give rise to any of the effects listed in clause (d) of the rule.  (b) The discharge does not contain human sewage.  (c) The discharge will not cause flooding, erosion, land instability, sedimentation, or property damage.
Discharge of stormwater, collected groundwater, and contaminants to the Ōtokia Creek from the attenuation basin, sediment retention ponds, to the Ōtokia Creek, and from the site where it may enter water in the Ōtokia Creek.	Regional Plan: Water  Rule 12.B.4.1 – Discharge of water or contaminant to water – discretionary activity.	The discharge of stormwater will include residual discharge of sediment contaminant following implementation of treatment measures.  The discharge of any contaminant to water is not otherwise provided for in the plan, and therefore is a discretionary activity.
Discharge of stormwater from McLaren Gully Road, Big Stone Road, and State Highway 1 into water, or onto land where it may enter water.	Regional Plan: Water  Rule 12.B.1.9 – Discharge of stormwater from any road to water or land – permitted activity.	The discharge of stormwater from roads is a permitted activity, and no resource consent is required.  All rule performance standards are met, specifically:  (a) The discharge will not cause flooding of any other person's property, erosion, land instability, sedimentation or property damage; and  (b) Provision has been made for the interception of any contaminant from the upgrade works to avoid, after reasonable mixing the effects listed in the rule.
Discharge of landfill gas, flared exhaust gases, dust, and odour into air from the landfill.	Regional Plan: Waste:  Rule 7.6.1 – New or operating landfills – discretionary activity.	Landfills for the disposal of waste, and associated discharges are discretionary activities.

Activity	Relevant Plan Rule	Commentary
	<p>Regional Plan: Waste:</p> <p>Rule 6.6.1 – Operation of facilities for the treatment or disposal of hazardous wastes – discretionary activity.</p>	<p>Facilities for the disposal of hazardous waste, and associated discharges are discretionary activities.</p> <p>Rule 6.6.1 is triggered as compliance with Class 1 waste acceptance criteria will allow some “hazardous wastes” to be accepted – e.g. contaminated soils.</p>
<p><u>Discharges of exhaust gases from the backup diesel electricity generator to power the leachate collection pumps and LFG flare system.</u></p>	<p><u>Regional Plan: Air:</u></p> <p><u>16.3.4.2 – Discharges from fuel burning equipment in Air Zone 3 – permitted activity.</u></p>	<p><u>The discharge of products of combustion from fuel burning equipment is a permitted activity, and no resource consent is required.</u></p> <p><u>All rule performance standards are met, specifically:</u></p> <p>(a) <u>The discharge will not exceed a heat generation capacity of 5MW.</u></p> <p>(b) <u>The chimney height will comply with Schedule 6 of the plan.</u></p> <p>(c) <u>No material specified in rule 16.3.3.1 will be burnt.</u></p> <p>(d) <u>Discharges of smoke, odour, particulate matter, or gases will not be noxious, dangerous, offensive, or objectionable beyond the site boundary.</u></p>
<p>Discharges of dust to air during construction of the upgrade of McLaren Gully Road, Big Stone Road, and State Highway 1.</p>	<p>Regional Plan: Air</p> <p>Rule 16.3.14.1 – Discharges from miscellaneous activities – permitted activity.</p> <p>This rule specifically provides that discharges from a new landfill are regulated by the Regional Plan: Waste.</p>	<p>Discharges of dust to air associated with road construction activity is a permitted activity, and no resource consent is required.</p> <p>All rule performance standards are met, specifically there will be no objectionable discharge of particulate matter at or beyond the boundary of the property.</p>
<p><del>Placement and use of the landfill and toe embankment, attenuation basin, and the</del> <u>Upgrades to McLaren Gully Road within wetlands, and associated alteration of the bed.</u></p> <p><del>Alteration of the bed of a wetland, and p</del> <u>Planting for wetland creation or enhancement.</u></p>	<p>Regional Plan: Water</p> <p>Rule 13.1.2.1 – Use of a structure within the bed of a lake, river, or regionally significant wetland – restricted discretionary activity.</p>	<p>The use of the bed of a river is a restricted discretionary activity.</p>



Activity	Relevant Plan Rule	Commentary
	Regional Plan: Water Rule 13.2.3.1 – Erection or placement of a structure within the bed of any lake, river, or regionally significant wetland – discretionary activity.	The placement of a structure within the bed of a river is not otherwise provided for in the plan, and is therefore a discretionary activity, requiring resource consent.
	Regional Plan: Water Rule 13.5.3.1 – Alteration of the bed of any lake or river – discretionary activity.	The alteration of the bed of the river is not otherwise provided for in the plan, and is therefore a discretionary activity, requiring resource consent.
	Regional Plan: Water Rule 13.6.2.1 – The introduction of any plant to or on the bed of any land or river for the purposes of restoring or enhancing habitat – permitted activity.	Planting on the bed of a river is a permitted activity, and no resource consent is required.  All rule performance standards will be met, specifically:  (a) No crack or grey willow will be planted.  (b) No plants listed in the Pest Management Plan will be planted.  (c) Reasonable steps will be taken to minimise the risk of sediment.  (d) The planting will not cause any flooding or erosion.  (e) The site will be left tidy following planting.
<del>Drilling of land for groundwater monitoring bores.</del>	<del>Regional Plan: Water Rule 14.1.1.1 – Drilling for the purpose of creating a bore – controlled activity.</del>	<del>The use of land for the drilling of bores for groundwater monitoring is a controlled activity, requiring resource consent.</del>
<u>Drilling of land for groundwater monitoring bores.</u>  Drilling of land for the landfill gas monitoring and collection system.	Regional Plan: Water Rule 14.2.1.1 – Drilling of land – permitted activity.	The drilling of land for the LFG monitoring and collection system is a permitted activity, and no resource consent is required.  All rule performance standards will be met, specifically:  (a) The drilling will not occur on land over an aquifer identified in the C-series maps; and  (b) The hole will be sealed on so that contaminants are prevented from entering the hole at any level.

Based on the above assessment, the various resource consent applications are to be bundled, and considered as a **discretionary activity** under the Regional Plans.

The NESFW, which ~~comes~~ came into force on the 3<sup>rd</sup> of September 2020 ~~introduces~~ introduced additional rules relating to activities affecting natural wetlands, and the reclamation of rivers. While not ~~currently~~ in force ~~at the time applications were made~~, the following provisions of the NESFW ~~are noted~~ are relevant to the proposal:

- The ~~diversion of taking of surface water or groundwater~~, and earthworks, within natural wetlands for the ~~construction of the landfill toe embankment and attenuation basin, and upgrading of McLaren Gully Road, that results in the~~ partial drainage of a natural wetland, is a prohibited activity under regulation 53.
- The taking of groundwater from the landfill groundwater collection system, ~~and earthworks~~ within 100 m of natural wetlands, that results in the partial drainage of a natural wetland is a non-complying activity under regulation 52, requiring resource consent.
- The diversion of water for land drainage, damming of water by the attenuation basin dam, and earthworks within 100 m of a natural wetland, that results in the partial drainage of a natural wetland is a non-complying activity under regulation 52, requiring resource consent.
- The discharge of water within 100m of a natural wetland is a non-complying activity under regulation 54, requiring resource consent.
- Vegetation clearance within, or within 10 m of a natural wetland, is a non-complying activity under regulation 54, requiring resource consent.
- The reclamation of the bed of a river for ~~placement of the landfill toe embankment and attenuation basin, and the~~ upgrading of McLaren Gully Road is a discretionary activity under regulation 57, requiring resource consent.
- ~~The damming of water, v~~Vegetation clearance, ~~earthworks, or land disturbance,~~ within or within 10 m of a natural wetland for natural wetland restoration is a restricted discretionary activity under regulation 39 requiring resource consent, where the conditions in regulation 38 cannot be met.

Based on the above assessment, various activities trigger either prohibited or non-complying status under regulations 52, 53, and 54 of the NESFW where they result in the partial or complete drainage of natural wetlands. As outlined in **section 7.2** above, the NESFW ~~comes~~ came into force on the 3<sup>rd</sup> of September 2020, which is after the date of the lodgement of these applications. Therefore, under section 88A of the RMA, the discretionary activity status at the time the applications were made remains unchanged.

Pursuant to section 123(d) of the RMA, a consent duration of **35 years** is sought for all resource consents involving the following activities:

- Taking and use of groundwater, ~~and taking of surface water.~~
- Diversion of surface water.
- Damming of surface water.
- Discharges of stormwater and contaminants to land and water.

- Discharge of contaminants to air.

~~An unlimited consent duration is sought for the land use consents for the drilling of land, pursuant to section 123(b) of the RMA.~~

A **10 year** lapse date is proposed for all resource consents, pursuant to section 125(a) of the RMA.

### 7.3 Resource Consents Required from the Dunedin City Council

The Dunedin City Council administers the following National Environmental Standards, and District Plans:

- The Resource Management (National Environmental Standard for Assessing and Managing Contaminants in Soil to Protect Human Health) Regulations 2011 (NESCS).
- Proposed Dunedin City District Plan (2GP), which was notified on the 26th of September 2015, and decisions issued by the Council on the 7th of November 2018. Variation 1 to the Plan was notified on the 20th of November 2019, and decisions were issued by the Council on the 18<sup>th</sup> of July 2020.
- Operative Dunedin City District Plan (Operative District Plan), which was made operative in 2006.

The NESCS is a nationally consistent set of planning controls that ensures land affected by contaminants in soil is appropriately identified and assessed before it is developed, and if necessary the land is remediated or the contaminants managed to protect human health. The NESCS applies where the land has been subject to an activity or industry described on the Ministry for the Environment Hazardous Industries and Activities List (HAIL).

A Preliminary Site Investigation of the historical presence of HAIL activities has been completed and is attached as Appendix 19. The investigation did not find any HAIL activities associated with the landfill site or proposed road upgrades. The landfill site, and land underlying the road upgrades have historically been used for farming, forestry, and road transport activities. As no HAIL activities have been identified, the NESCS does not apply to the project and resource consent is not required under the NESCS. are no records held by the Otago Regional Council or Dunedin City Council indicating the land has historically been used for any activity contained on the HAIL list. Accordingly, the provisions of the NESCS do not apply to the project.

The majority of the rules of the 2GP as amended by Variation 1, that are relevant to the project are beyond challenge, and therefore treated as operative under section 86F of the RMA. The exception is those rules relating to indigenous vegetation clearance, and earthworks, and upgrading of roads within the existing legal road reserve. These rules remain subject to various appeals and consequently the equivalent rules in the Operative Dunedin City District Plan remain relevant to the project.

~~Variation 1, which makes various changes to the 2GP provisions to ensure that they function as intended; substantive amendments to fix identified problems or gaps within a small number of provisions; and mapping amendments to make minor adjustments to zone or mapped area~~