BEFORE THE COMMISSIONERS ON BEHALF OF THE OTAGO REGIONAL COUNCIL

Consent No. RM16.093.01
Consent No. RM18.345

BETWEEN	**CRIFFEL WATER LIMITED**
	Applicant
AND	**LUGGATE IRRIGATION COMPANY LIMITED / LAKE MCKAY STATION LIMITED**
	Applicant
AND	**OTAGO REGIONAL COUNCIL**
	Consent Authority

SUBMISSIONS OF COUNSEL FOR ALL APPLCIANTS

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1. These submissions are filed in respect of both applications.

The proposals

2. The section 42A report correctly records the progression of these applications.

3. Both applications effectively commenced as a "roll over" exercise. They sought replacement permits on the basis of recorded usage, but subject to the minimum flows.

4. Initially, it appeared that the Criffel Water Limited (**CWL**) application (the first in time) would be uncontroversial and would proceed non-notified on the basis of a raised residual flow through the weir (from 50 l/s under the current dam permit to 90 l/s) along with a method to review the residual flow in the event of a dam upgrade[1].

5. In direct meetings, Fish and Game staff of the day (Mr Peter Wilson) expressed support and even advanced the winter generation idea off his own bat. That idea was subsequently abandoned.

6. As time passed, it became apparent that the parties' attitude was changing. In addition, the Luggate Irrigation Company and Lake Mackay Station Limited (**LIC/LMS**) applications were creating cumulative effects concerns that needed to be addressed.

7. With the assistance of Mr Hickey and Mr Simpson, all applicants resolved to change their approach. The current proposal is a careful application of policy 6.4.0A to the whole of the command areas for all applications, along with a revision of the network delivery infrastructure.

8. The results of Mr Hickey and Mr Simpson's work are:

[1] Communications between counsel and KTKO Limited's Dr Matt Dale and Mr Tim Vial.

(a) A common approach to identifying and dividing the primary allocation based on an irrigation rate of 5mm/day delivered through existing spray infrastructure.

(b) Transfer of some take history to supplementary takes, enabling higher minimum flows and new irrigation areas to be developed.

(c) A commitment to upgrade the scheme to avoided losses.

9. Had the original form of the applications been approved, then a short term might have been justifiable since neither set of applications committed the consent holders to reduce their primary allocation, upgrade their schemes, or their irrigation efficiency. It was business as usual. But now having gone down a quite different path to win the support of Mr Hickey and the reporting officers, the applicants are vitally interested in the term of the permits.

Notification: section 104(3)(d).

10. It is of interest that Aukaha raise an issue about notification of the CWL consent but neither Fish and Game nor the Department of Conservation (**DoC**) do.

11. The issues relates to the interplay between the CWL and LIC/LMS applications. The LIC/LMS application is assessed cumulatively on CWL, but CWL is not cumulative on LIC/LMS. Whether a person is "affected" by the CWL application must be assessed in the absence of the LIC/LMS application.

12. Even if a *"Ngati Rangi* [2]" (no takes) environment is assumed to be the comparator for the purposes of section 95E, that would still not lead to a decision that either Runaka, DoC, or Fish and Game are affected persons. An effects assessment does not occur in isolation. The objectives and policies of a Plan are relevant to determining whether a person is affected in an environmental (rather than a philosophical) sense: see *Tasti Products v Auckland Council* [2016] NZHC 1673[3].

[2] *Ngati Rangi Trust v Manawatu-Whanganui Regional Council* [2016] NZHC 2948.
[3] *Tasti Products v Auckland Council* [2016] NZHC 1673 at [81]-[82].

13. In the recent Environment Court decision of *Lindis Catchment Group Incorporated v Otago Regional Council*[4] (**Lindis**), the ORC advanced, and the Court accepted, that a "no takes" environment was fanciful:

> [192] *Mr Logan submitted that there are seven key conclusions from the Act and the planning instruments:*
>
> 1. *planning takes place within the legal parameters set by the Act, the NPSFM, the Regional Policy Statement, Proposed Otago Regional Policy Statement and the settled provisions of the Regional Plan: Water;*
> 2. *a "no takes" environment is not envisaged by the Act or any of the subordinate planning instruments;*
> 3. *the Act and subordinate planning instruments recognise and provide for continued abstraction, within limits;*
> 4. *a river with no abstraction (except for domestic use and stock water) is not the [only] benchmark for the plan change;*
> 5. *abstraction is subject to constraints that safeguard life-supporting capacity of water, and maintain natural character and aquatic ecological values, with priority being given to indigenous species.*
> 6. *in decisions under the Act about water takes, existing values must, as a minimum, be maintained; and*
> 7. *in decisions under the Act, there may be requirements for enhancement of the current environment to achieve specific objectives and policies.*
>
> *With the addition of the bracketed word[s] we generally accept that submission.*

14. It is submitted that a "no takes" environment is not the benchmark to assess whether a person is affected. The relevant framework is that set out in the objectives and policies of the Otago Regional Plan: Water (**RPW**) and National Policy Statement on Freshwater Management (**NPSFM**). Neither applies the *Ngati Rangi* "no takes" starting point for assessment.

15. The CWL application complies with the minimum flow and the primary allocation limits. There is nothing about the proposal that is not expressly contemplated by the RPW policy framework. There is no adverse effect on any person that is adverse.

16. Measured against the status quo, the proposal is entirely an improvement, so there are no adverse effects.

[4] *Lindis Catchment Group Incorporated v Otago Regional Council* [2019] NZEnvC 166.

What is the "environment"?

17. The Wynn Williams advice attached at appendix 5 to the section 42A report is largely (but not completely) accepted.

18. Dam permit 2007.676 for the CWL weir expires on 12 April 2045. The environment includes the weir and a residual flow of 50 l/s. It is a long-term feature of the catchment that influences the characteristics of the environment. The proposed permits must be viewed in the context of that dam permit for so long as it exists.

19. The description of the High Court's decision in *Ngati Rangi* is accepted. But *Ngati Rangi* is not the end of the story. The High Court in *Ngati Rangi* completely overlooked Policy B7 of the NPSFM:

> ***Policy B7 and direction (under section 55) to regional councils***
>
> *By every regional council amending regional plans (without using the process in Schedule 1) to the extent needed to ensure the plans include the following policy to apply until any changes under Schedule 1 to give effect to Policy B1 (allocation limits), Policy B2 (allocation), and Policy B6 (overallocation) have become operative:*
>
> 1. *When considering any application the consent authority must have regard to the following matters:*
>
>   a. *the extent to which the change would adversely affect safeguarding the life-supporting capacity of fresh water and of any associated ecosystem and*
>
>   b. *the extent to which it is feasible and dependable that any adverse effect on the life supporting capacity of fresh water and of any associated ecosystem resulting from the change would be avoided.*
>
> 2. *This policy applies to:*
>
>   a. *any new activity and*
>
>   b. *change in the character, intensity or scale of any established activity – that involves any taking, using, damming or diverting of fresh water or draining of any wetland which is likely to result in any more than minor adverse change in the natural variability of flows or level of any fresh water, compared to that which immediately preceded the commencement of the new activity or the change in the established activity (or in the case of a change in an intermittent or seasonal activity, compared to*

that on the last occasion on which the activity was carried out).

3. This policy does not apply to any application for consent first lodged before the National Policy Statement for Freshwater Management 2011 took effect on 1 July 2011."

20. That direction has not been complied with by the ORC, but it is submitted that it should not be ignored here.

21. Although the proposal results in a reduction in the change to natural variability of flows, the point is that the NPSFM adopts as the point of reference for assessing the effects of change, the environment that "immediately preceded the change in the established activity". It is submitted that when you come to evaluate the proposal against the NPSFM, the "environment" is not the *Ngati Rangi* environment, but rather it is the status quo. In the end, it was the status quo comparison that was decisive in *Lindis*.

22. The Clutha and Roxburgh dams are part of the "environment".

23. The environment therefore includes Longfin Eels (*Anguilla dieffenbachia*) only in so far as they exist now, but not as they may be in the future. Co-operation by the consent holder with a translocation project is a potential positive effect. The effects of takes on values not currently present (or present but not habitat constrained) is not an adverse effect on the environment.

24. The "environment" also includes trout. From an ecological point of view trout are a pest[5].

25. So what does all this mean?

    (a) Although *Ngati Rangi* applies, it is limited to section 104(1)(a). Ngati Rangi means:

        (i) For CWL, the dam permit is part of the environment. But it's take permit and LIC and LMS' existing and applied for permits are not.

[5] Above n 4, at [205].

(ii) For LIC/LMS, if you grant the CWL permits, then those are part of the environment you are assessing, as is the CWL dam.

(b) When you come to section 104(1)(b) and the NPS FM, Objective B7 requires you to evaluate the change proposed against the Status Quo environment, which includes the existing takes.

(c) Eels are not part of the existing environment.

(d) Trout are part of the existing environment. But in the context of NPS objective B1 their influence is negative.

Volumes: Max or 90th percentile?

26. Policy 6.4.0A of the RPW is the water use "efficiency" policy:

> *To ensure that the quantity of water granted to take is no more than that required for the purpose of use taking into account:*
>
> *(a) How local climate, soil, crop or pasture type and water availability affect the quantity of water required; and*
>
> *(b) The efficiency of the proposed water transport, storage and application system.*

27. The 42A report volumes are calculated on the basis of Aqualinc 90th percentile seasonal demand estimates. That assumes adequate water is available to irrigate for the full season in 9/10 years. CWL's numbers set out in Mr Hickey's evidence applies maximum rate figures (i.e. rates and volumes that will suffice every year).

28. It is submitted that the 90th percentile approach lacks any foundation in the RPW. If water is available (i.e. the minimum flow has not been reached) why not enable water to be used for the whole season in 10/10 years <u>if</u> the water is available to take? What policy is served by leaving the applicant water-short in a 1/10 year drought? That is exactly when the water has its highest value. In other words, it is an inefficient use of the available water resource to leave it in the river when the minimum flow is exceeded and the consent holder is suffering a 1/10 year drought.

29. The 90th percentile approach does not have regard to the efficient use of natural resources as required by section 7(b).

Rule interpretation

30. The evidence of Mr Paul Whyte for Aukaha suggests that Rule 12.1.4.8 enables the regional council full discretion to decide the minimum flow without reference to the minimum flow set for Luggate Creek in schedule 2A of the RPW. That approach is not consistent with RPW Chapter 6 policy suite[6] or the case law regarding the application of specific rules on activities as compared with more general rules.

31. Policy 6.4.5 relates to consents for activities that have a minimum flow set in accordance with Schedule 2A of the RPW, including the Luggate Catchment. The corresponding rule, 12.1.4.4, deals expressly with the application of the minimum flows set out in Schedule 2A of the RPW. Therefore, because the present applications come under rule 12.1.4.4 that is the triggering rule in terms of activity status.

32. By contrast, rule 12.1.4.8 applies to any activities in which consent is sought under rules 12.1.4.2 to 12.1.4.7 and 12.2.3.1A. That rule is general in application as it applies regardless of whether a catchment has a minimum flow set in accordance with Schedule 2A. A matter of discretion within rule 12.1.4.8 necessarily enables the Regional Council to impose a minimum flow where none has been set. There is therefore a conflict between rules 12.1.4.8 and 12.1.4.4 given that one deals with the applications of minimum flows set out in schedule 2A of the RPW and the other suggests that the minimum flow can be disregarded.

33. The apparent conflict is resolved by giving effect to the more specific rule (Rule 12.1.4.4) as opposed to the more general rule (Rule 12.1.4.8). That approach is consistent with case law.

34. The High Court in *Auckland Urban v Auckland Council*[7] considered the judicial review of a decision of the Auckland Council to grant non-

[6] Discussed in the rebuttal evidence of K L Scott.
[7] *Urban Auckland v Auckland Council* [2015] NZHC 1382.

notified consents to the extension of the Bledisloe Wharf. Resource consents were required under the Auckland Council Regional Plan: Coastal, the Auckland Council Regional Plan: Air, Land and Water and the Proposed Auckland Unitary Plan (**PAUP**).

35. Under the PAUP, resource consent was required for a structure in the Coastal Marine area under the General Coastal Marine Zone as a restricted discretionary activity[8]. However, the PAUP also provides for rules in the Port Precinct as a permitted activity. The Respondents, Ports of Auckland Limited and Auckland Council, considered that the wharf extension could continue without resource consent in the Port Precinct area under the PAUP. The High Court held:

> [175] *I accept the submission for the respondents that the activity status in the precinct takes precedence over the activity status in the zone, whether more restrictive or enabling. While Mr Palmer argued the zone should take precedence as part of the hierarchal structure of resource management, the approach argued for by the Council, supported by POAL is consistent with the principle of interpretation that the specific overrides the general. The rules are to be interpreted as having the effect of regulations. It also must be borne in mind that this issue arises against the background of POAL holding a coastal permit for occupation of the relevant area within the General Coastal Marine zone.*

36. The more specific rule prevailed over the general rule, despite the more general rule being more restrictive. That approach is analogous to the present applications given that Rule 12.1.4.4 is the triggering rule in terms of activity status and is more specific to primary allocations for catchments set out in Schedule 2A of the RPW. Whereas, rule 12.1.4.8 is more general in its application and applies to catchments regardless of whether they are outlined in Schedule 2A of the RPW. Therefore, Rule 12.1.4.4 must prevail over the application of 12.1.4.8 in terms of the discretion of the Regional Council to set a minimum flow.

37. Furthermore, the Court of Appeal in *Powell v Dunedin City Council* held that while it may be appropriate to seek the plain meaning of a rule from the words themselves (i.e. the matter of discretion in rule 12.1.4.8

[8] At [169]-[170].

regarding minimum flow) that exercise cannot be done inside a vacuum[9]. Regard must be had to the immediate context, which in this case, is Rule 12.1.4.4 (which triggered the resource consent requirement) and the chapter 6 policy framework. Mr Whyte's literal reading of rule 12.1.4.8 without taking into account the immediate policy and rule context would not be consistent with the Court of Appeal's approach in *Powell*.

National Policy Statement on Freshwater Management

38. The evidence of Aukaha, particularly the evidence of Ms Maria Bartlett, considers that in light of the future review of the RPW to give effect to the NPSFM that the consent term should be reduced so that this consent can be considered against that future document. For the reasons given in these submission that is not, in of itself, an appropriate reason for reducing a consent term. Whether or not the RPW strictly gives effect to the NPSFM does not inhibit the adverse effects of the activity being in line with existing planning documents, including the NPSFM, which is available now and can be given effect to.

39. The evidence of Ms Kate Scott sets out why these applications give effect to policies in the NPSFM, the Proposed Regional Policy Statement and the Partially Operative Regional Policy Statement, which do give effect to higher order planning documents. Our review will outline the application of the NPSFM in light of the recent *Lindis* decision.

Objective B1

40. The Environment Court elaborated on Objective B1 in light of the corresponding section 6(c) RMA directive. It found:[10]

> [475] *…Objective B1 of the NPSFM is both wider and looser than the section 6(c) test. It requires safeguarding (which we treat as synonymous with "protecting") the life-supporting capacity of the*

[9] *Powell v Dunedin City Council* [2004] 3 NZLR 721 at [35].
[10] Above n 4 at [475] and [478].

ecosystem of the main river. As we indicated earlier, life supporting capacity is a flexible term and applies on a continuum.

[478] If the Lindis mainstem was free of introduced predators (trout) then we consider the most important comparisons in this proceeding would be of the 550 MF and 900 MF options against the N[atural] F[low] option because, where threatened indigenous fish species are present in (or could be returned to) an ecosystem, the natural conditions of that ecosystem are obviously important. However, the Lindis mainstem has trout present, so the importance of the ecosystem decreases under Objective B1 of the NPSFM (subject always to water quality standards) at least in relation to returning to natural flows. Where trout are present there is really no such set of conditions as a "natural state" to use as a baseline. There is only a condition of maximising trout size, population, and food production which have less importance under the NPSFM.

41. Objective B1 requires protection of the values that are present now. That outcome is consistent with the overall approach of the NPSFM and canvassed in the preamble to the NPSFM. Any comparison to values that historically existed (in catchments were trout are present) is not appropriate given that would have the effect of increasing trout food source, trout size and population, to the detriment of indigenous ecosystems. That is not an outcome supported by Objective B1 of the NPSFM and was not supported by the Environment Court in *Lindis*.

42. Aukaha has engaged with the Applicants regarding the reintroduction of Longfin Eel to the catchment. The Applicants agree with that goal in principle. However, to support the reintroduction of Longfin Eel Aukaha also seeks to increase the minimum flow (from that sought by the Applicants) to 300 L/s. The evidence of Dr Allibone finds that increase is not necessary given that a healthy population of Longfin Eel can be sustained at a 180 L/s flow scenario. This is supported by modelling of Mr Ian Jowett.

43. Dr Richard Allibone goes further to treat the reintroduction of Longfin Eel to Luggate Creek with caution, noting that Longfin Eels become piscavorous at 30-40 cm in length and Koaro (ranked as at risk

declining) are prey items. Therefore, any increase in minimum flow would have the same effect as trout population on indigenous ecosystems. That runs counter to the goal of Objective B1.

44. There have been no studies on the impact of Longfin Eel on populations of the Nationally Critically threatened Clutha Flathead Galaxias. Anecdotal evidence suggests that a likely outcome of reintroducing piscavorous Longfin Eel would see the demise of Clutha Flathead Galaxias. Given this uncertainty, Mr Allibone suggests a precautionary approach should be adopted.

45. Assessing the Luggate Creek against Objective B1 suggests that the most important ecosystems to be "protected" are the indigenous species present now, including populations of Koaro. Trout are already present in Luggate Creek and conditions which increase the minimum flow will have the effect of increasing trout size and population, to the detriment of those indigenous ecosystems. The same outcome could result if Longfin Eel are reintroduced to the catchment in regards to Koaro population and potentially the Clutha flathead galaxias (if they are present).[11]

46. Objective B1 is to *"safeguard the life-supporting capacity, ecosystem processes and indigenous species…".* Safeguard means to protect what is there from harm. That objective and the policies that implement it do not mandate the re-introduction of species not currently present in a waterbody, regardless of whether that species may be endemic or historically present. As Dr Allibone explains in his paragraphs 40-43, there is a real risk of unintended consequences associated with introducing species (indigenous or otherwise) to an existing ecosystem.

47. In this respect Dr Clucas' evidence is strangely silent on the interplay between Longfin Eel and trout. It may be a subject beyond her expertise. But there are hints that she is alive to the issue. At paragraph 24 Dr Clucas speaks of large eels *"as a biological agent to restore ecological balance and re-establish apex predators*". The

[11] Evidence of R M Allibone at [40].

precise meaning of that phrase is elusive because of course the Luggate already has an apex predator: trout. Trout eat elvers, galaxiids,.and Koaro. Eels eat Koaro and galaxiids too[12].

48. At paragraph 25 Dr Clucas refers to "the potential to restore ecological balance in the catchment, which is currently trout dominated". It would seem that what Dr Clucas is advocating, but not saying explicitly, is adult eels eating juvenile trout, and so eventually replacing trout as the apex predator in the catchment. That might be a seductive vision, but it is fraught with risk of unintended consequences (such as when stoats were introduced to control rabbits), is probably not what Fish and Game has in mind as a form of relief in this proceeding[13], and this is not the forum to advance it.

Objective B2

49. Objective B2 seeks to "avoid any further over-allocation of fresh water and phase out existing over-allocation". The evidence of Ms Scott covers the effect of this provision in relation to Luggate Creek. We do not restate that evidence other than to refer to the relevant passage[14].

Objective B3

50. This objective seeks to improve and maximise the efficient allocation and efficient use of water. Efficiency was the subject of lengthy discussion in the *Lindis* decision where the Court identified that the most efficient option was the option which imposed the lowest minimum flow as opposed to the option that allocated less water. In regards to efficient use, the Court held[15]:

> [410] *…the higher minimum flow simply means that the water within the primary block is less reliable (because it is available to be taken less often). It is the reliability of the water that drives investment in highly efficient infrastructure, not the total primary allocation. This is due to two factors - the relatively high cost of pivot irrigators, and the watering regime undertaken which requires a little water but often.*

[12] Evience of R M Allibone at [40].
[13] The evidence of Morgan Trotter at paragraph 25 seems to anticipate trout and eels happily co-existing.
[14] Evidence of K L Scott at [35]-[40]
[15] Above n 4 at [410].

51. Later in the decision, and in relation to Objective B3, the Court found[16]:

> [486] *The allocation is maximised by the Galleries 550/1639 scenario because it achieves the highest reliability of take (and therefore efficiency of use) compatible with improving the ecosystem services of the lower river through the whole of its length.*

52. The cost of infrastructure and efficiency in relation to consent duration has been covered in the evidence of Mr Roger Simpson and Mr George Collier. That evidence finds that a 10 year consent duration will provide no financial return for any new irrigation development to proceed. A minimum consent duration of 25 years would be required to justify the infrastructure upgrades to achieve the efficiency required.

53. The result of a 10 year consent will be that the upgrades simply will not proceed and the efficiency of use cannot be achieved. That is not a result consistent with Objective B3 of the NPSFM which seeks to achieve efficient allocation *and* use.

54. The Court goes on to find that:[17]

> [487] *As for maximising the efficient use of the water we can add to our discussion in Chapter 7 that Objective B3 must be read within Objective B5 (which is enabling communities to provide for economic wellbeing): we consider that in the circumstances the most efficient use of the water (once taken) can and should be left to the landowners and the market(s) they operate in because there is no evidence of "misuse" of the water.*

55. Consistent with that approach, the applicants have agreed to enter into a rationing agreement approved by a water management group to enable the efficient allocation of water during low flows.

Consent Term

56. Criffel Water Limited seeks a 35 year consent term. The Section 42A Report has recommended a 10 year term. At the core of the recommendation is the forthcoming plan change to the RPW.

[16] Above n 4 at [486].
[17] Above n 4 at [487].

57. The idea conveyed by the section 42A Report is that requiring the consent to be applied for again would better align with the policy direction set out in the NPSFM and the future plan change to the RPW. The basic idea seems to be that the current application would be better decided under the future state of the RPW than the current version. The Applicant considers that this is misguided and does not reflect the law on consent term.

58. The following considerations have been distilled from case law and are relevant in setting a term of consent:

    (a) Security of investment; the cost of funding a further resource consent application is a significant factor leaning in favour of a greater duration (*PVL Protein Limited;*[18] *Genesis Power Limited;*[19] *RFBS v Waikato Regional Council;*[20] *Living Earth*[21]). Dr Bell's evidence[22] is that CWL has spent in excess of $200,000 on the present application, and CWL simply cannot afford to do it all again inside a 10 year term. Mr Harvey's evidence records that LMS/LIC has spent in excess of $100,000.[23]

    (b) Where there is nothing to suggest that consent requires re-evaluation from a "Resource Management Act perspective" then imposing a shorter term is not appropriate (*Brooke-Taylor v MDC*[24]).

    (c) The existence of a review condition can properly influence a decision on the term of a consent, but should not obscure the fundamental difference between reviewing a condition and re-evaluating a fresh application. (*PVL Proteins Limited*[25]).

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[18] *PVL Proteins Limited v Auckland Regional Council* [A061/01].
[19] *Genesis Power Ltd v Manawatu-Wanganui RC* (2006) 12 ELRNZ 241; [2006] NZRMA 536 (HC).
[20] *Royal Forest and Bird Protection Society of New Zealand Inc v Waikato Regional Council* — [2007] NZRMA 439.
[21] *Living Earth v Auckland Regional Council* (Environment Court, Auckland A 126/06, 4 October 2006 Judge Sheppard.
[22] Evidence of A J B Bell para 25.
[23] Affidavit of C M Harvey at [22].
[24] *Brooke-Taylor v Marlborough District Council* (Environment Court, Wellington, W67/2004, 2 September 2004) at [69].
[25] Above n 19 at [82].

(d) A shorter term would not be appropriate where adverse effects can be dealt with by way of a review to consent conditions (*PVL Proteins Limited*).

(e) The length of term needs to be weighted against long-term investment certainty, particularly in the context of significant infrastructural assets (*Genesis Power Limited; Brook-Taylor v MDC; Living Earth*).

(f) A planning instrument that could become operative in future is relevant in so far as the continuation of the consent could hinder the effectiveness of that instrument (*RFBS v Waikato Regional Council*). In that case this consideration was balanced against the cost to the applicant of funding a further application for consent.

(g) Shorter terms may be justified where there is a lack of confidence in the enforceability of review conditions (*Genesis Power Limited*);

(h) It may not be efficient in terms of section 5 of the Act to require a new consent application in 10 years for structure designed to last 50 years (*Brooke-Taylor*).

Case Law on consent term

59. For the purpose of outlining a review of relevant case law in this area we have outlined cases in chronological order from oldest to most recent.

PVL Proteins Limited v Auckland Regional Council [A061/01]

60. The Applicants sought consent to discharge contaminants to air. A short term was granted and on appeal the Appellants sought a 35 year term.

61. The Environment Court discussed the safeguards that a term of consent and a review condition provide in determining the duration of consent. When a consent expires the question of whether a new

consent should be granted is open and it is for the applicant to provide an assessment of effects and ways in which those effects might be mitigated. The application may then be publicly notified and determined. Entirely new conditions may be imposed where appropriate.[26]

62. By comparison, a consent authority's power to review is limited to the circumstances in section 128(1) and what has been specified in the condition. There is no obligation on the consent holder to assess the environmental effects of the activity and to offer new mitigation measures. The Court does however note that in its experience these concerns are diminished in practice as the consent-holder often provides an independent review to protect its position.[27]

63. The Court found that a review condition can properly influence a decision on the term of a permit (which in that case was a discharge permit) but should not obscure the fundamental difference between a review and a re-evaluation of the consent.

Brooke-Taylor v Marlborough District Council (Environment Court, Wellington, W67/2004, 2 September 2004)

64. This was an appeal against conditions of consent relating to the construction of a combined fixed and floating jetty with attached boatshed, decking and ramp at the northeast corner of Horseshoe Bay, in the Pelorus Sound.

65. Out of consideration for Maori claims to ownership of the seabed and foreshore, the Council had placed a 10 year term for the jetty and boat shed. The structures would cost approximately $90,000.

66. The Court observed:[28]

> *In our view, it is not efficient in terms of s 5 to require applicants to submit a full application in 10 years for a structure designed to last 50 years, when there is nothing to suggest the proposed jetty requires re-*

[26] Above n 19 at [78].
[27] Above n 19 at [80].
[28] Above n 19 at [69].

> *evaluation from an RMA perspective at the end of the decade. They cannot be guaranteed use of that facility beyond 10 years as a result of the council's condition of consent. The worth of that investment to the Brooke-Taylors is called to question if its use is uncertain beyond the decade.*

67. There are three important points to note from this passage.

    (a) It is not efficient for a new consent to be applied for relating to the same activity when from an "RMA perspective" there is nothing to suggest that it requires re-evaluation.

    (b) That "sustainable management" is the overarching principle to be achieved when determining consent term.

    (c) Whether it would not be worthwhile pursuing the investment if there was a possibility that the structures could not be used after the consent term is an important factor.

68. The Council's planning officer indicated that a 10 year term was generally considered appropriate by the Council because circumstances in the Coastal Marine Area change rapidly.[29] In response, the Court observed:

> *We take this as referring to regional plans being subject to 10 year review, allowing new resource management issues to be raised which may affect what currently exists in that environment. In his closing submissions, counsel for the appellants suggests that the term of consent might be amended to incorporate a review condition to be exercised every 10 years. Such a condition would ensure that the council reserved the right, in the event of any change of circumstance to revisit the consent while not arbitrarily requiring a new application and re-evaluation of the jetty prematurely.*
>
> *We considered this offer carefully, for the project itself demonstrates no ill effects on the environment. Our inclination was to give consent for 20 years with a right of review thereafter. But because there are so many such structures in the coastal marine area, we considered it appropriate*

[29] Above n 19 at [71].

to have a telephone conference with the parties requesting a reply from the council on the issue as to term.

69. The result in this case was that the 10 year term was cancelled and the term set for 20 years, subject to a review clause to be agreed between the parties.

70. This case demonstrates that a review condition can be drafted to incorporate changes to the planning environment, noting that this case was relevant to the coastal marine area and the planning environment at the time of this decision was in a state of flux.

Genesis Power Limited v Manawatu-Wanganui Regional Council (2006) 12 ELRNZ 241; [2006] NZRMA 536 (HC)

71. This case concerned various applications for resource consents to renew a water take for the Tongariro Power Development Scheme (**TPD**), owned and operated by Genesis Power Limited. Ngati Rangi Trust opposed the application on the basis that it would have significant adverse effects on Maori cultural and spiritual values.

72. The Environment Court's decision was to reduce the term of the consents from 35 years to 10 rather than to impose a review condition. That approach was thought to better accommodate the differences of the two opposing parties (Genesis and Ngati Rangi Trust) by allowing them time to negotiate a "meeting of the minds".

73. The Environment Court decision was set aside in the High Court and upheld in the Court of Appeal[30] on the ground that the purpose of the Court's "construct" of the meeting of the minds was based on a wrong legal test. The Court of Appeal found that a perceived lack of evidence did not provide a basis for making a decision to reduce the duration of consent, in a manner which did not meet the RMA's sustainable management purpose.

74. The judgment of the High Court provides an in-depth analysis of the factors supporting the duration of consent and was approved by the

[30] Ngati Rangi Trust v Genesis Power Ltd [2009] NZRMA 312 (CA)

Court of Appeal. The High Court considered the following additional matters in regards to the duration of consent:

(a) The impact of the TPD on the environment over time. The effects on the environment were well understood and likely to be the same over the next 35 years of operation;

(b) Maori culture and spiritual values. It was considered that these would also remain constant; and

(c) Possible mitigation measures which might arise during the consent term. There was no expectation that proposals as to mitigation options would be made over the next 10 years which would have suggested that shorter term.

(d) The possibility to review the conditions on consent.

75. The High Court endorsed the reasoning in *Brooke-Taylor v MDC*[31] in regards to the efficiency of requiring a fresh resource consent application when there would be no changes during the term of the consent that, from an RMA perspective, would require re-evaluation. In this case the adverse effects on the environment and on Maori were assessed to be constant and there was no indication that further mitigation measures would be developed over the 35 year proposed consent. Therefore, in terms of sustainable management, there would be no benefit in seeking re-evaluation of the consent.

76. At paragraphs [77]-[90] the High Court discusses the extent to which the Environment Court misconstrued the consent review process under section 128 of the RMA. The Environment Court considered that the power to review consent conditions in section 128 of the RMA "would not have the same ameliorating power as a fresh application"[32]. The High Court did not agree.

77. The High Court found that the Environment Court took an unduly restrictive view of the ambit of the powers given by the consent condition review process in section 128. Subject to restrictions on the

[31] Above n 24.
[32] Ngati Rangi Trust v Genesis Power Ltd [2009] NZRMA 312 (CA) at [77].

power to cancel a consent[33] section 128 does provide for a "wholesale review" of the consent. The Court held that:

> *Obviously, reviewing the conditions of existing consents is more limiting than a fresh consents process. But, subject only to the limit on the power to cancel any one of the 30 consents under appeal, I do not agree that, in practical terms, the consent conditions review process is more limiting than the process for fresh resource consents.*

78. The High Court quashed the Environment's decision to reduce the term from 35 years to 10 years.

Living Earth v Auckland Regional Council (Environment Court, Auckland A 126/06, 4 October 2006 Judge Sheppard

79. The Environment Court in this case, considering an application for a clean-fill site summarised the approach set out by the High Court in Genesis Energy Limited:

> [495] *In his Judgment, Justice Wild referred to cases in which consents had been granted for shorter terms rather than longer because of potential for the adverse impacts to increase or vary during the term of the consent, or because of an expectation that new information regarding mitigation would become available during the term, Absent circumstances of those kinds, the learned Judge endorsed the reasoning in Brooke-Taylor v Marlborough District Council substituting a 35-year term for a jetty in place of a 10-year one:*

80. Absent circumstances of the kind referenced above, the Court must consider whether, from an RMA perspective the consent would require re-evaluation at the end of the consent term.

Royal Forest and Bird Protection Society of New Zealand Inc v Waikato Regional Council — [2007] NZRMA 439

81. The Court considered the appropriate term of a coastal permit allowing removal of mangrove seedlings. In this case the applicant, Harbour Care, sought consent to authorise hand-removal of mangrove seedlings from the tidal areas of the Whangamata Harbour (within the Otahu Estuary) that had not been previously colonised by mangroves.

[33] A resource consent can only be cancelled if there were both material inaccuraices in the application and adverse effects on the environment resulting from the exercise of the consent (see paragraph [81]).

The term sought by Harbour Care was for 30 years. Ngati Whanaunga opposed the application entirely but on appeal refined its position seeking that any consent has a maximum term of 3 years.

82. The committee decided on a term of 20 years noting that this would be a reasonably long period to enable the ongoing nature of the activity and that it was conceivable that a statutory plan addressing seedling removal might be developed within that period. The committee was less confident that such a plan would eventuate within 10 years.

83. On appeal, the Court accepted that the duration of a consent should be determined primarily by sound resource management practice and in light of the Act's sustainable management purpose. In giving effect to that purpose the Court had regard to the following considerations, distilled from the High Court decision in *Genesis Power Limited*:

    (a) Whether any adverse impacts arising from the activity could increase or vary during the term of the consent.

    (b) Whether new information on mitigation might justify a shorter term.

    (c) When re-evaluation of the consent as a whole might be required.

84. In relation to the final consideration, the Court considered that:

> *"Some relevant planning instrument could become effective well before the expiration of 20 years, and that continuation of the removal of mangrove seedlings could hinder the effectiveness of such a plan"*

85. The possibility that a relevant planning instrument could be in place sooner than the 20-year term granted by the council, and that exercise of the consent could hinder the effectiveness of that instrument, influenced the Court to reduce the term to 12 years.

86. The Court goes on to say:

> *Obviously there is no means of deciding when re-evaluation may be required by a method of calculation. But with respect to the committee, we believe that it may be required rather earlier than 20 years from the present. Unlike Genesis Power, this is not a case where major capital*

> *investment indicates a longer term. In our judgment a term of 12 years would balance the prospective re-evaluation against the cost to a voluntary organisation in funding a further application for a replacement consent.*

87. While a planning instrument was a factor in this case the duration of the term was balanced against the cost of funding a further application for replacement consent. If there was significant investment in capital required for this consent (like in *Genesis Power Limited*) then the Court would not have reached the same outcome. Here, there was no capital investment as it was simply a case of enabling mangrove seedlings to be removed so that was not a relevant consideration for the Court.

Applying the cases to the CWL facts:

88. The applicant's investment is a relevant factor. That investment includes not only the current assets, but also the extent to which the investment required by the resource consent applications themselves is feasible over the proposed consent term. The evidence of Mr Roger Simpson, Mr George Collier, and Mandy Bell show that the efficiency upgrades required to make the reduced rates of take and volumes work are not feasible over a 10 year term. What is required is:

    (a) 10 years to roll out the scheme delivery upgrades and new irrigation infrastructure.[34]

    (b) 15-20 years of exercising the new infrastructure before the "payback" point is reached.[35]

    (c) From year 25 to the end of term, an economic return on capital and risk is achieved on the investment.[36]

89. Also relevant is that the CWL weir permit expires on 12 April 2045.

[34] Evidence of A J B Bell paragraph 23.
[35] Evidence of G Collier page 7 table 6.
[36] Evidence of G Collier paragraph 39.

90. The cost and proportionality of the application process is a factor favouring longer term consents. That is also now explicit in section 18A of the Act:[37]

> **18A Procedural principles**
>
> Every person exercising powers and performing functions under this Act must take all practicable steps to—
>
> (a) use timely, efficient, consistent, and cost-effective processes that are proportionate to the functions or powers being performed or exercised; and
>
> …[omitted]

91. The term of the consent is largely a function of the degree of confidence held about the effects on the environment and the extent to which those effects might change or require further additional mitigation over time.

92. The potential for future change in the planning instruments is not a significant factor when there review powers accommodate those changes. Here, there is are explicit review powers designed precisely for the purpose that was[38]:

> *(b) in the case of a coastal, water, or discharge permit, when a regional plan has been made operative which sets rules relating to maximum or minimum levels or flows or rates of use of water, or minimum standards of water quality or air quality, or ranges of temperature or pressure of geothermal water, and in the regional council's opinion it is appropriate to review the conditions of the permit in order to enable the levels, flows, rates, or standards set by the rule to be met; or*
>
> *(ba) in the case of a coastal, water, or discharge permit, or a land use consent granted by a regional council, when relevant national environmental standards or national planning standards have been made; or*

93. What we can see is that the Act explicitly provides the power to review that the staff seek when the ORC has completed its NPSFM review program. Therefore nothing is gained by a shorter term.

[37] Resource Management Act 1991, section 18A.
[38] Inserted by the Resource Legislation Amendment Act 2017, which did not exist in the case of *Genesis Power Limited.*

94. Taking into account the applicant's offer to be bound by a Council approved rationing regime and carefully applying RPW policy 6.4.19 does not reveal any basis for not granting the full available term of 35 years.

Rebuttal evidence

95. These submissions were prepared in advance of the applicants' rebuttal evidence being completed. That evidence will be filed by 5pm on Tuesday 22 October. Counsel anticipates making a short oral submission addressing that evidence at the hearing on 24 October.

Dated this 18th day of October 2019

P J Page

Counsel for the Applicants