

Under The Resource Management Act 1991

In the matter of an application for resource consent to discharge wastewater overflows from Queenstown Lakes District Council's wastewater network

Reply submissions of counsel for Queenstown Lakes District Council

6 December 2019

**MEREDITH
CONNELL**

Solicitors:

J Campbell | J Beresford
PO Box 90750, Victoria Street West, Auckland 1142
DX CP24063
T: +64 9 336 7500
janette.campbell@mc.co.nz |
joanna.beresford@mc.co.nz

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1 Introduction

- 1.1 These submissions reply to matters raised by the Commissioners, Otago Regional Council officers and submitters during the course of the hearing on QLDC's application for a wastewater network discharge consent.
- 1.2 If the consent is granted, QLDC considers that there needs to be a balance between conditions that address the matters of concern to ORC and the community but that still enable QLDC to meet its objective of operating a functional wastewater network in which investment is prioritised to deliver a resilient system at the same time as reducing the risks and effects of overflows.
- 1.3 QLDC has substantially revised the proposed conditions since the application was initially lodged with ORC. QLDC says that the application is now far more refined and narrow in scope such that it better achieves this balance between addressing the concerns of the community and enabling QLDC to lawfully operate its reticulated wastewater network. QLDC's amendments to the proposed conditions throughout the process, and right up to and including this reply, have been as a result of its genuine willingness to respond to issues raised by submitters, the Consent Authority and the Commissioners, and to propose practical solutions. These revised conditions (dated 6 December 2019) are discussed later in these reply submissions.
- 1.4 The starting point for considering the application must be that the District needs a reticulated wastewater network. QLDC needs to collect wastewater and convey it to plants for treatment and disposal. QLDC and its consultant team have canvassed the other options and there is no realistic alternative.
- 1.5 Although the practicalities of managing wastewater is an unpleasant topic, the reality is that every urban area needs a reticulated wastewater network with fuses to protect its structural integrity and avoid the significant and adverse public health effects of sewage backing up in and around buildings.
- 1.6 In that context, the discussion needs to be how can the Region and District best manage overflows from those fuses if they are activated. QLDC says that a network discharge consent, that authorises a limited scope of overflows (ie those that result from causes outside of its control) is the best way to do this. This is particularly the case where the conditions require open and transparent reporting on capital works, operational expenditure, community education initiatives and overflow responses designed to reduce the risks and effects of overflows.

2 Statutory framework – “gateway tests”

- 2.1 The sections of the RMA that are relevant to your statutory decision making process are ss 104, 105, 107, 217 and Part 2.
- 2.2 Potential barriers to the grant of consent have been discussed; effectively gateway tests to be passed before you move on to consider the merits of the

application in the usual way under s104(1)(a) and Part 2 of the RMA. It has been suggested that you must not grant the consent if:

- (a) you have inadequate information to determine the effects (s 104(6) of the RMA).
- (b) After reasonable mixing the discharge would give rise to conspicuous oil or grease films, scums or foams, or floatable or suspended materials, conspicuous change in colour or visual clarity, emission of objectionable odour, rendering the water unsuitable for consumption by farm animals; or significant adverse effects on aquatic life, unless you are satisfied that grant is consistent with the purpose of the RMA and either exceptional circumstances justify the grant, the discharge is of a temporary nature; or the discharge is associated with necessary maintenance work (s 107 of the RMA).
- (c) It would be contrary to any restriction or prohibition or any other provision of the Water Conservation (Kawarau) Order 1997 (**WCO**) or the grant of consent would require change or variation to the provisions of the WCO (s 217 of the RMA).

2.3 Section 3, 4 and 5 of these legal submissions address these tests in more detail but in summary QLDC says that the application passes each because:

- (a) There is sufficient information to assess the likely effects on the environment bearing in mind that these discharges are already occurring and that their frequency and duration will be limited by the conditions of consent.
- (b) The proposed conditions include measurable parameters to prevent the effects listed in s 107 after reasonable mixing. Even if the conditions did not do so, it would still be open to you to grant consent on the basis that the discharges are temporary or exceptional.
- (c) Granting the consent would not be contrary to any restriction or prohibition or any other provision of the WCO because wastewater network operators are exempt. In any event, the evidence is that the provisions of the WCO can remain without change or variation because the grant of the consent would not (after reasonable mixing) adversely affect the overall water quality of the relevant water bodies.

3 Information provided is sufficient to understand effects

3.1 QLDC is disappointed that, even at the conclusion of the hearing, there seemed to be a reluctance from submitters and the ORC officers to accept that QLDC has no desire to, and is not seeking, a licence to deliberately pollute the District's waterways.

3.2 QLDC has employed well qualified and experienced engineers, asset managers and contract managers to deliver wastewater services to the community. These people are doing their very best to correctly prioritise investment in three waters infrastructure generally, and wastewater infrastructure more particularly, to ensure that the network is resilient and overflows are dealt with quickly and effectively.

- 3.3 Through the submission and hearing process the scope of the discharges sought to be authorised by the consent reduced and the obligations imposed on QLDC increased via amendments to the proposed conditions. The s 42A report noted that use of s 104(6) should be reserved for instances where the applicant has not provided all reasonable information and accepted that there was sufficient information for ORC to assess the application.¹ QLDC is somewhat puzzled that, despite the provision of significant additional information via the hearing process, the ORC officers concluded in reply that there was insufficient information to grant consent in terms of s104(6) of the RMA.
- 3.4 QLDC disagrees with this conclusion. Resource consent applications (and the conditions that form part of them) need to have sufficient detail to allow the consent authority to understand the effects of the proposal.² In this case, the duration of discharges is limited.³ The contaminant levels after reasonable mixing (ie the dissolved oxygen concentration and ammoniacal nitrogen concentration) are constrained, as are the potential effects on aquatic life or public health.⁴
- 3.5 It is true that there is uncertainty over the exact location, duration and timing of any particular overflow discharge because this cannot be predicted. This is because overflow events are largely caused by third party actions outside of QLDC's control.⁵ However, this does not mean that the effects of the application cannot be understood:
- (a) It is not necessary to specifically identify the point at which the discharge occurs to meet the information requirements for resource consent applications under the RMA. A number of such global or area wide consents were discussed during the hearing including stormwater and wastewater network consents and tree trimming consents. It is common practice to specify the area to which a consent applies (including any future areas) by identifying those areas on a map. Maps showing the existing and future extent of the wastewater networks proposed to be covered by the network discharge consent formed part of the application and could be appended to the conditions of consent for ease of reference if this were desirable.
 - (b) The location of the discharge points and the nature of the receiving environment is relevant to assessing the effects of the discharges on the environment. However, in this case QLDC is proposing a conservative, lowest common denominator approach to cater for the more sensitive waterbodies by:
 - (i) limiting the duration of all discharges authorised by the consent to 24 hours and 6 hours from notification of the discharge; and
 - (ii) defining the zone of reasonable mixing based on the type of water body.

¹ Section 42A report, section 9.1.10 at page 35..

² RMA, Schedule 4, Clause 1

³ Proposed conditions, unauthorised discharges statement, clauses a) and c).

⁴ Proposed conditions, unauthorised discharges statement, clause b).

⁵ Proposed conditions, unauthorised discharges statement, d) provides that overflows that result for QLDC's lack of maintenance or investment in the network are not within the scope of consent.

4 Section 107 effects

- 4.1 As discussed during the hearing there are three ways through s 107 of the RMA – ie either the discharges will not, after reasonable mixing, have the effects listed in section 107 or the discharges are temporary, or the discharges are exceptional.
- 4.2 The Commissioners raised concerns during the hearing that a condition stating that the s 107 effects were not authorised by the consent would not be sufficiently certain or measurable. QLDC has endeavoured to address that concern by proposing clause (b) of the unauthorised discharges statement. That clause specifies measurable parameters that will ensure s 107 effects are not authorised by the consent. A definition of reasonable mixing that is tailored to the different types of receiving environment has also been included to make the scope of what is authorised by the consent clearer.⁶
- 4.3 Even if you considered that the consent would have those listed effects (after reasonable mixing) it is still open to you to grant consent if the discharge is temporary or exceptional.
- 4.4 There is case law that provides guidance as to what temporary means in a s 107 context:
- (a) In *Re Horowhenua District Council*⁷ the Environment Court found a continuous discharge of treated wastewater into a stream by a District Council for a maximum period of two years was a “temporary” discharge for the purposes of s 107. The Horowhenua District Council had sought discharge consents to enable ongoing operation of treated wastewater discharge systems servicing the Shannon wastewater treatment plant. One of the consents sought was for continuation of the existing discharge to the Otauru Stream for a period of two years to allow for the new system to be constructed and become operational.
 - (b) In *Beadle v Minister of Corrections*⁸ the Environment Court found that discharge of stormwater runoff from time to time from a construction site into a stream for the period required to construct a corrections facility was a “temporary” discharge for the purposes of s 107.
 - (c) In *Sawmill Workers Against Poisons Inc v Whakatane District Council (No 2)*⁹ the High Court found that discharge of water from a contaminated site during the development of a large commercial and bulk retailing complex for a period of approximately 9 weeks was of a temporary nature.
- 4.5 Dictionary definitions of the word are also helpful:

⁶ Ms McIntyre on behalf of Kāi Tahu proposed re-inserting the clause about no conspicuous oils and scums and the ORC officers supported this. If the commissioners considered that this is sufficiently certain QLDC is comfortable with that approach.

⁷ *Re Horowhenua District Council* [2015] NZEnvC 45.

⁸ *Beadle v Minister of Corrections* [2002] NZEnvC 196.

⁹ *Sawmill Workers Against Poisons Inc v Whakatane District Council (No 2)* [2006] NZRMA 500. This was a judicial review proceeding concerning the decision of the District Council to process the retail developer’s application for resource consents on a non-notified basis.

- (a) The Cambridge Dictionary (online) defines temporary as: (adj) not lasting or needed for very long.
- (b) Merriam-Webster (online) defines temporary as: (adj) lasting for a limited time.
- (c) Longman (online) defines temporary as: (adj) (1) continuing for only a limited period of time (2) intended to be used for only a limited period of time.

4.6 It is submitted that the key principles that can be distilled from the case law and definitions are that intermittent discharges can be considered temporary and that the duration must in some way be limited. In this case QLDC is proposing conditions that limit the duration in two ways –ie QLDC must stop the discharge within 6 hours of being notified of it and the overall duration must not exceed more than 24 hours. These durations are clearly much shorter than the weeks, months or years that the courts have been willing to consider temporary in other cases.

4.7 It is further submitted that the discharges are exceptional, in the sense articulated by the District Court in *Paokahu Trust v Gisborne District Council*.¹⁰ This because the discharges originate from a public reticulated wastewater network that QLDC provides to fulfil its core public health and sanitation obligations to residents, businesses and visitors to the District.¹¹

5 Water conservation order

5.1 The Commissioners asked the reporting officers about whether:

- (a) the matters in the Kawerau WCO are also addressed in the ORPW;
- (b) whether the WCO applied;
- (c) whether reasonable mixing was allowed for in compliance with the WCO; and,
- (d) if so, whether granting consent would comply with the WCO.

5.2 The answers to those questions (discussed in more detail below) are:

- (a) The WCO is referred to but there are no relevant rules;
- (b) Yes, the WCO applies;
- (c) Yes, the WCO allows for reasonable mixing before standards are required to be met.
- (d) Yes, granting consent would comply with the WCO.

¹⁰ *Paokahu Trust v Gisborne District Council* (Environment Court, A 162/03, 19 September 2003).

¹¹ QLDC's Local Government Act 2002 and Health Act 1956 obligations are summarised in Appendix A.

- 5.3 The ORPW refers to the WCO but does not specifically refer to the water quality classes or any requirements to maintain those classes.
- 5.4 The purpose of water conservation orders is to recognise and sustain outstanding amenity or intrinsic values which are afforded by waters in their natural state and, if waters are no longer in their natural state, the amenity or intrinsic values of those waters which in themselves warrant protection because they are considered outstanding.¹²
- 5.5 The WCO identifies parts of the Dart River and its tributaries, Route Burn, Rees River (and its tributaries), Greenstone River, Caples River, Lochnagar and Lake Creek and Nevis wetland as waters to be preserved¹³ and parts of the main stems of Kawerau River, Nevis River (and its tributaries) Shotover River, Dart River, Rees River, Diamond Lake, Diamond Creek and Reid Lake, Lake Wakatipu, Lochy River and Von River as waters to be protected.
- 5.6 The location of QLDC's reticulated networks means that of this list it is only the water quality of Lake Wakatipu, and the, Rees (near where it joins Lake Wakatipu), Kawarau and Shotover Rivers that could potentially be affected by this application. Schedule 2 of the WCO requires that the water quality in Lake Wakatipu be managed to Classes AE (Aquatic Ecology), CR (Contact Recreation), F (Fisheries) and FS (Fish Spawning) Standards. Water in the Kawarau and Shotover rivers must be managed to Class CR. There is no water quality class for the Rees River. The water quality classes are as in Schedule 3 of the RMA and those standards apply after reasonable mixing of any contaminant or water with the receiving water and disregard the effect of any natural perturbations that may affect the water body.¹⁴
- 5.7 Where a water conservation order is operative, s 217(2) provides that the relevant consent authority (emphasis added):
- (a) **Shall not grant a water permit, coastal permit, or discharge permit** if the grant of that permit would be **contrary to any** restriction or prohibition or any other **provision of the order**:
 - (b) **Shall not grant a water permit, a coastal permit, or a discharge permit** to discharge water or contaminants into water, **unless** the grant of any such permit or the combined effect of the grant of any such permit and of existing water permits and discharge permits and existing lawful discharges into the water or taking, use, damming, or diversion of the water is such that **the provisions of the water conservation order can remain without change or variation**:
 - (c) **Shall, in granting any water permit, coastal permit, or discharge permit** to discharge water or contaminants into water, **impose such conditions as are necessary to ensure that the provisions of the water conservation order are maintained**.
- 5.8 Clause 4 (5) of the WCO provides that:

¹² RMA, s 199.

¹³ WCO, Schedule 2

¹⁴ RMA Schedule 3, Explanatory note.

Except as provided in this order the exercise by a regional council of its functions and powers under section 30(1)(e) and (f) of the Act (as they relate to water) are restricted or prohibited as set out in Schedule 2.

5.9 However, the exemption under cl 5(a) of the WCO provides that the prohibitions in cl 4(5) and Schedule 2 do not limit ORC's functions or powers to grant a resource consent for any part of the preserved or protected waters for the purpose of maintenance or protection of any network utility operation.¹⁵ In that regard:

- (a) QLDC is a network utility operator (ie someone who undertakes or proposes to undertake a drainage or sewerage system) and its reticulated wastewater network is a network utility operation as defined in s 166 of the RMA.
- (b) One of the purposes of the network discharge consent is to protect the District's wastewater scheme. The network utility operation would not deliver its intended public health function if it regularly (around 70 times per year) blocked and backed sewage up into and around the homes and businesses that it was designed to remove sewage from.

5.10 Even if the application were not within the exemption, Dr Olsen's first supplementary statement confirmed that if the consent is granted the water quality classes in Schedule 2 of the WCO that relate to ecology would (after reasonable mixing) be maintained. In terms of the contact recreation quality Dr Hudson's evidence in chief also confirmed that provided adequate steps are taken to reduce the likelihood and size of overflows, and that a robust plan exists to respond adequately to a discharge event of this nature (extremely low probability, moderate risk), the overall health risk to local communities will be very low.¹⁶ This means that granting the consent would not be contrary to any provision in the order and the WCO can remain without change or variation.

5.11 Further, although the discharges are not authorised and therefore not part of the existing environment in a legal sense, the discharges are in fact already occurring. Therefore their effects are already reflected in the acknowledged high quality of the District's waterbodies.

6 Part 2 and section 104 assessment

6.1 Your consideration of matters under s 104(1) is expressly subject to Part 2.

6.2 In *RJ Davidson Family Trust*¹⁷ the Court of Appeal clarified the application of Part 2 to the consideration of resource consent applications following the Supreme Court's decision in *King Salmon*. Where a plan has been prepared having regard to Part 2 and with a coherent set of policies designed to achieve those imperatives, the result of a genuine process that has regard to those policies in accordance with s 104(1) should be to implement those policies in evaluating a resource consent application. In such a case, resort to Part 2 would likely not add anything and it could not justify an outcome contrary to the thrust of the

¹⁵ A network utility operator is a person undertakes or proposes to undertake a drainage or sewerage system under RMA, s 166.

¹⁶ BoE HUDSON, at paragraph 8.3.

¹⁷ *RJ Davidson Family Trust v Marlborough District Council* [2018] NZCA 316.

policies. However, if the plan prepared does not adequately reflect Part 2, it will be appropriate and necessary for a consent authority to refer to Part 2 in determining a resource consent application. In this case the ORC officers have acknowledged that the ORPW is out of date¹⁸ so Part 2 will be relevant to your consideration of QLDC's application.

- 6.3 In this case, the sustainable management purpose of the RMA is directly relevant because allowing QLDC to lawfully operate its reticulated wastewater network enables local people and communities to provide for their social and economic well-being and for their health and safety.

Obligations under other legislation

- 6.1 QLDC, as a local authority is required to collect, treat and dispose of the District's sewage in order to meet its obligations under the Local Government Act 2002 and the Health Act 1956:
- (a) QLDC is required to assess the provision of water services (ie sewerage, treatment and disposal of sewage) in its district from a public health perspective:¹⁹
 - (b) QLDC must also continue to provide its water services, and maintain its capacity to meet its obligations.²⁰
 - (c) QLDC has a duty to improve, promote, and protect public health within its district. In doing so QLDC must regularly inspect its district to ascertain if there are any nuisances, or any conditions likely to be injurious to health or offensive.²¹
- 6.2 A summary of these obligations and the sanctions that QLDC can be subject to if it fails in these duties are included in **Appendix A**.

RMA obligations

- 6.3 As set out above, QLDC has obligations as a local authority to dispose of the District's sewage. QLDC also has responsibilities under the RMA and accepts that if it fulfils its statutory wastewater duties negligently or recklessly, and that results in overflows, then it is appropriate that ORC take enforcement action as punishment and deterrent.
- 6.4 However, the evidence is that most of the time QLDC (with its separated wastewater and stormwater systems, ongoing capital investment and operations investment and robust response procedures) is performing at a high standard but needs to authorise occasional overflows that reach water so that it can meet its other statutory obligations.
- 6.5 The ORC officers say that the community's view is that sewage in water is offensive and can never be excused so it is inappropriate for QLDC to even seek such a consent. The officers say that ORC should never be seen to condone

¹⁸ ORC officers' comments on conditions dated 26 November 2019 regarding the network investment priorities.

¹⁹ LGA, s 125.

²⁰ LGA, s 130.

²¹ Health Act 1956, s 23.

overflows by granting this consent. The ORC officers have further criticised QLDC for seeking this consent because it would reverse the onus of proof in a prosecution and that this would be problematic for its enforcement and regulation of water quality.²²

6.6 These criticisms are problematic and puzzling:

- (a) Unless an activity is a prohibited activity then any person has a right to apply for a resource consent to authorise that activity and have it assessed on its merits in accordance with the relevant provisions of the RMA and applicable planning instruments. In this case the application is for a discretionary activity under the ORPW.²³ It is not open to the consent authority to effectively treat an activity as prohibited when it is not, simply because it does not wish to be seen to condone it.
- (b) Yes, there would effectively be a reversal of the onus of proof. Rather than simply proving that certain facts occurred in order to make out a prosecution, the ORC would need to also demonstrate that a condition of the consent was breached or that a particular discharge was not authorised by the consent. This is the effect of the grant of any consent and so cannot be a reason in and of itself to decline consent. The reach of RMA liability is wide, akin to absolute liability with limited specified statutory defences, rather than a traditional regulatory offence with strict liability.²⁴ QLDC is taking on the responsibility for disposing of its community's sewage and says that where overflows occur that are not its fault and it stops the overflow and cleans up quickly, then the Act's almost-absolute liability ought not apply; compliance with the consent should provide QLDC with safety from prosecution.
- (c) QLDC says that it should only be subject to punishment by enforcement action if it is in some way at fault. QLDC is also prepared to take responsibility even where it is blameless but the adverse effects are beyond a specified threshold. In that situation ORC retains its usual discretion about whether/which enforcement actions to take but the substantive point of a network discharge consent is a clear distinction as to what is authorised or not.

6.7 If ORC were to say that this discretionary activity is something it could not be seen to condone, it would make QLDC criminally liable for events occurring in its

²² ORC officers' comments on conditions dated 26 November 2019, page 6.

²³ Sustainable Glenorchy sought that if the consent is granted it is confined to overflows to land in circumstances where the overflows could not reach water and the Commissioners asked the reporting officers to confirm that this would be a permitted activity under the ORPW. Rule 12.A.2.1 of the ORPW provides that "except as provided for by Rules 12.A.1.1 to 12.A.1.4, the discharge of human sewage to water, or onto or into land in circumstances where it may enter water, is a discretionary activity." As all discharges from QLDC's reticulated wastewater network have the potential to reach water QLDC has sought consent for a discretionary activity under Rule 12.A.2.1. Rules 12.A.1.1 to 12.A.1.4 provide for discharges to land from long-drops or septic tanks (which do not apply in to land from QLDC's reticulated wastewater network) as a permitted activity. As there is no rule in the ORPW that provides for discharge of human sewage to land (in circumstances where it could not enter water), which means that it is an innominate activity and falls to be considered as a discretionary activity under s 87B(1) of the RMA.

²⁴ *Canterbury Regional Council v Newman* [2002] 1 NZLR 289; *Wellington Regional Council v Shell Oil NZ Ltd* DC Wellington CRN2032012948.

pipework where the Council is simply endeavouring to use best practice mechanisms to carry out its statutorily mandated actions. This would put QLDC in a position where it has to choose which of the statutes by which it is governed it will breach.

- 6.8 In my submission, this would be an immature regulatory response. By declining consent ORC would effectively set a standard that it knows cannot practically be achieved. It would then leave to its regulatory discretion whether or not it enforces the near absolute liability of the RMA in any particular event, or whether QLDC's lack of culpability meant that no enforcement action should be taken. This is a familiar approach: for example Mr Adams confirmed that while Central Otago District Council's reticulated wastewater network has similar overflows it does not get prosecuted, and consequently that Council has no plans to seek a consent to authorise those events in its district. A more mature regulatory response would be to consider whether this application has appropriately established which actions should not be punished and authorise those by resource consent. Events beyond that threshold lead to the prospect of punishment. This is what QLDC is trying to achieve by seeking a network discharge consent that clearly states what it authorises.

Benefits of the consent

- 6.9 Commissioner McGarry queried whether the continued operation of QLDC's wastewater network was really a benefit of granting the consent because QLDC could not prevent its communities from using the wastewater network without failing in its duties as a local authority.
- 6.10 This highlights the difficult position that QLDC is in. A resource consent is a permission to do something that is not otherwise authorised under the RMA or a relevant planning instrument. A private applicant for resource consent can choose not to exercise a resource consent and not proceed with its project for various reasons (for example the project becomes uneconomic, or the applicant's business strategy changes). This is not the case for QLDC. In reality it does not have the choice not to operate its wastewater network; it is statutorily required to do so because otherwise the adverse effects on its community and the District's environment would be too great.
- 6.11 If consent is not granted QLDC will still need to operate its network but that network will be subject to third party actions that cause overflows and overflows will still occur. This forces QLDC in to the position of not being able to *lawfully* operate its wastewater network. A similar conclusion drove the Environment Court to grant the sewage discharge consent sought by the Gisborne District Council in the *Paokahu Trust* case, notwithstanding the discharge's significant adverse effects.
- 6.12 It is pertinent to note the benefits to QLDC being able to legally operate its wastewater network. Notwithstanding the comments in the ORC legal submission that QLDC as a local authority should choose to self report all overflows to water, QLDC is under no legal obligation to do so (and is of course entitled to put the regulator to the proof in any prosecution proceedings). In that context the openness, transparency, reporting, audit obligations and accountability provided by the proposed conditions of consents are important benefits of granting consent. As explained above, QLDC considers that there is additional benefit in allowing the *lawful* operation of the reticulated wastewater

network. It cannot be acceptable from a rule of law perspective to put a public body in a position where it must choose which of its statutory obligations it must breach.

7 Proposed conditions

7.1 The reply version of conditions contains a number of amendments to respond to the submitter and ORC officer comments on the conditions. There are also a number of amendments that were raised by the submitters or the ORC officers that have not been incorporated in the revised conditions and this section of the submissions explains QLDC's reasoning for its approach.

Conditions that frustrate the grant of consent

7.2 The general law is that a condition of consent cannot negate the consent granted and to use the conditions to subsequently negate that consent would be unreasonable and unacceptable in law.²⁵

7.3 QLDC is of course disappointed that the ORC officers' recommendation remains to decline consent. QLDC genuinely considers that its approach is the correct one and that it is likely that more local authorities will need to apply for similar consents in the future as our expectations for freshwater management grow as a country. From QLDC's perspective it appears that the ORC officers have steadfastly maintained the negative attitude towards the consent and have used the opportunity to comment on conditions to attempt to ratchet down what is authorised by the consent to the point where virtually no discharges would be within its scope.

7.4 For example on the ORC officers' version of conditions and comment there would be zero metre reasonable mixing zone for any of the waters identified in schedule 2 of the WCO (notwithstanding that reasonable mixing specifically applies to the water quality classes), discharges from pump stations would be excluded, future waste water collection networks would be excluded, only one overflow incident per 10,000 wastewater network connections would be authorised, every part of the network within 20 meters of a water body would be prioritised for increased network investment and discharges that exceed four hours would not be authorised even though it was made clear in evidence that this would conflate the KPIs which are an average measurement with a sensible consenting target.

7.5 If you were minded to grant consent but follow the ORC officers' comments and amendments to conditions, you would be at risk of granting "a consent that is not a consent" with only a five year term of consent under which QLDC would have substantial reporting education and management plan preparation responsibilities.

7.6 QLDC urges you to put the ORC officers' amendments to conditions aside and instead focus of the reply version of the conditions proposed by QLDC.

²⁵ *Ravensdown Growing Media Ltd v Southland Regional Council*(Environment Court C194/2000)

Certainty and certifying conditions

- 7.7 It is settled law that conditions should be enforceable, require specificity and clarity and accuracy of expression leading to a measure of certainty.²⁶ Similarly, conditions which are subject to the consent of a council officer need to be drafted in a manner which puts the officer in the role of certifier, not arbitrator.²⁷
- 7.8 The Commissioners were concerned that if the environmental parameters (in condition 11(c) as it then was) were retained then the condition would not be sufficiently certain as it will not be possible to immediately ascertain whether the discharge was authorised by the consent because some of those matters would require completion of the ecologist's report under condition 9 of the consent, which may take some time.
- 7.9 QLDC considers that this is analogous to a situation where a discharge consent had a numerical limit such as volume. It would also not be immediately obvious as to whether the condition had been breached and whether the discharge was within the scope of consent. Rather this would require the regulatory authority to investigate and measure or estimate the volume of the discharge to determine if the consent is outside the scope of consent.
- 7.10 QLDC considers that removing the environmental parameters altogether and relying on only the time from notification to ceasing the overflow would be too much of a blunt tool because it does not take into account the scale of any adverse effects on the environment. For example, that approach could authorise discharges that are stopped quickly but have a high level of effects but would not authorise a small trickle leak that continued for a longer time period.
- 7.11 Accordingly QLDC has reconsidered which of the environmental parameters are the most suitable for determining whether a discharge should be authorised or not (in terms of effects on the environment and certainty) and recast the condition. These amendments have also been intended to address other concerns expressed by the Commissioners as to the subjective nature of some of the s 107 terminology and introduce components more in the nature of a bright line test.

Purpose statement

- 7.12 QLDC has proposed that the purpose of consent be:
- To require the consent holder to achieve environmental improvements – with a regulatory framework that provides the transparency, the unity involvement, staged network improvements and accountability – by requiring the adoption of the best practicable option to avoid overflows from the wastewater reticulation network, with the major focus and priority being avoidance.
- 7.13 The ORC officers have commented that the purpose could be considered to be “to discharge wastewater as a result of overflows in the fresh water receiving environments, or onto land in circumstances where it may enter fresh water at various locations”.

²⁶ *Ferguson v Far North DC* [1999] NZRMA 238.

²⁷ *Pine Tree Park Ltd v North Shore City Council* [1996] NZRMA 401.

- 7.14 While QLDC would also be comfortable with the ORC officers' version of the purpose statement QLDC says that the officers' version merely duplicates what the grant of consent is for. QLDC considers that its purpose statements is preferable because it actually adds value to the consent in terms of stating its intention to be transparent and accountable.

Deletion of pump stations and wastewater treatment plants

- 7.15 The ORC officers' version of conditions deletes note two from the unauthorised discharges statement that reads "discharges from wastewater treatment plants are not within the scope of, and are not authorised by, this consent". The comments then go on to say that discharges from wastewater treatment plants and pump stations should not be within this scope of the consent.
- 7.16 The intention of this consent has never been to authorise discharges from wastewater treatment plants. QLDC already holds discharge consents for discharges of treated sewage from these plants and copies of these were provided to you at the hearing.
- 7.17 The ORC officers have not given any reasons for their view that pump stations should be excluded and managed through separate discharge permits. The obligations that are being imposed by the conditions of consent are comprehensive and complex. Having multiple consents for different parts of the network is unwieldy, administratively difficult, inefficient and costly for all parties. QLDC says that there will be better environmental outcomes from having one comprehensive consent that covers both pipework and pump stations within the network.

Future wastewater networks

- 7.18 The ORC officers recommended deleting the future wastewater networks at Kingston, Glenorchy and Cardrona. These areas will need reticulated wastewater in the future (imminently in the case of Kingston) and when this infrastructure comes online it makes sense for the comprehensive conditions of consent to automatically apply to those new networks. Mr Higgins²⁸ noted that Kāi Tahu is supportive of a management approach that takes account of the mauri of the entire catchment and sub-catchments not just individual sections. QLDC considers that a network discharge consent that automatically applies to future networks is more consistent with this holistic management approach.
- 7.19 QLDC opposes any condition of the type sought by Sustainable Glenorchy preventing the piping of untreated wastewater over Stoney Creek or Buckler Burn Creek. Such a condition would be using this consenting process to pre-empt infrastructure design and investment decisions that need to be made about the best infrastructure to service those communities under LGA process.

Prioritising network investment

- 7.20 The ORC officers have recommended deleting condition 13 so that the network improvements management plan no longer prioritises those parts of the network specified in Schedule 1A(Natural values), 1B (Water Supply Values) or

²⁸ Mr Higgins' Cultural Statement on behalf of Kāi Tahu at paragraph 44.

1D (Kāi Tahu values) of the ORPW. The ORC officers' rationale for that is because the ORPW is out of date.

- 7.21 Your assessment of the application under s 104 requires you to consider the planning framework articulated in either an operative or proposed plan. Making decisions based upon what the ORC officers wish that their plan contained would be taking into account irrelevant considerations. A single resource consent application is not the right place to reassess the appropriateness of these parts of the ORPW.
- 7.22 QLDC is proposing to prioritise investment in those areas because it recognises that natural value, water supply and cultural values are matters of key concern to submitters and the community generally. QLDC remains of the view that it is appropriate to prioritise investment in these areas in order to recognise and address the specific concerns the community and Kāi Tahu. In addition, in the conditions attached to this submission, QLDC has added Bullock Creek, Luggate Creek, Mill Creek and Horne Creek as additional areas where improvements to the nearby wastewater network will be prioritised.

Independent certification

- 7.23 The ORC officers have suggested a number of amendments requiring that QLDC's management plans be independently prepared or reviewed.
- 7.24 QLDC has no problem with requirements that persons be suitably experienced, qualified or trained - this is a given.
- 7.25 However in many cases the requirement that a person be independent from the consent holder makes little sense because QLDC employees will in fact be the best placed to prepare these documents. For example in relation to future wastewater networks in condition 14 the process is that developers will engage consultants to design new infrastructure and then QLDC employs a team to certify that the assets comply with that design and the Land Development and Subdivision Code of Practice. This is part of QLDC's a core business and it simply would not make sense to have an external person certifying this.
- 7.26 Similarly in condition 10a which relates to the initial visual assessment to be undertaken, while QLDC currently uses its contractors to do this initial assessment it still wishes to retain have the ability take those functions in house. A consent condition that effectively prevents this takes away a major incentive for the contractor to perform.

Timing of notification.

- 7.27 QLDC accepts that it should promptly notify the affected parties under condition 9. QLDC does not wish to be required to immediately (as opposed to promptly) notify the Consent Authority because the immediate priority should be to stop the overflow.

8 Other matters

Emergency works and powers

- 8.1 The Commissioners queried whether QLDC's emergency response to overflows could be authorised under s 330's emergency works provisions.
- 8.2 The orthodox interpretation of s 330 of the RMA is that it authorises any emergency works required to rectify and remediate a situation but it does not authorise any initial non-compliance with the RMA itself. In relation to an unauthorised discharge s 330 would not authorise the discharge but would enable works to prevent or remediate the discharge to be undertaken without first obtaining consent. In this case QLDC's response to and remediation of overflows does not require a resource consent so it does not need to rely on using emergency powers under the RMA.
- 8.3 As discussed with the Commissioners during the course of the hearing there is an alternative interpretation of s 330 of the RMA under which the adverse effect on the environment is considered as the blockage or obstruction in the wastewater network and the immediate preventative or remedial work required is the overflow (ie to protect the integrity of the network and prevent adverse public health effects) such that s 15 of the RMA (discharge of contaminants) would not require resource consent.
- 8.4 QLDC's preference is not to rely on such an interpretation of the emergency powers provisions. Such authorisation could only be an ad-hoc response, rather than a considered and managed approach to dealing with wastewater overflows.

Risk assessments

- 8.5 There was discussion during the hearing about the limits of the ecological risk assessment. The ecological risk assessment submitted with the application was essentially the second half of a risk assessment, with the first half assumed. It was conservative, assuming for each site that there **was** an overflow; assessing the likelihood of that flow reaching water and the nature of the receiving environment if it did. What it did not do was assess the **likelihood** of the infrastructure failing at that site in the first place and generating an overflow. This other half of the risk assessment was provided by Mr Hansby²⁹ when he assessed the levels of storage and redundancy at each site with high environmental risk. Mr Hansby concluded that for many of the pump stations, the risk of failure leading to discharge to the environment is low because of the contingency measures in place.

Trade wastes bylaw

- 8.6 The Commissioners asked QLDC to advise whether the existing QLDC Trade Waste Bylaw covers discharges from visitor accommodation and, if not, could it do so. The Commissioners also inquired whether a bylaw could require accommodation providers to put up signs advising what products are suitable

²⁹ BoE HANSBY Peter, Supplementary dated 7 November 2019.

for disposing of via toilets and requiring bins to be provided for any products that damage the wastewater network.

- 8.7 Currently QLDC has a Water Supply Bylaw 2015 and a Trade Waste Bylaw 2014. The Trade Waste Bylaw is due for review with QLDC currently drafting a new bylaw for consultation. QLDC intends to consult on a bylaw that can assist with its education and awareness obligations under the proposed consent conditions.

9 Duration of consent

- 9.1 The s 42A report sets out the principles for determining the appropriate duration of consent. The opening legal submissions assessed the application against the relevant principles and submitted that the reasons for a longer term outweighed the reasons for a shorter term. The Commissioners requested further detail on the case law that underpins the principles. Summaries of the relevant case law are set out in **Appendix A**.

10 Conclusion

- 10.1 QLDC asks that you grant the resource consent for a term of at least 20 years. This will put in place a long term management strategy that gives certainty to the ORC, QLDC and the community as to how overflows will be managed.

Appendix A: Local authority obligations

Local Government Act 2002 obligations

- (a) At a high level, the purposes of local government require QLDC to meet the current and future needs of its community for good-quality local infrastructure in a way that is most cost-effective for households and businesses. Good-quality local infrastructure means infrastructure that is efficient; effective; and appropriate to present and anticipated future circumstances.³⁰
- (b) Further, the principles of local government require QLDC to take a sustainable development approach, which means taking into account the social, economic, and cultural well-being of people and communities; the need to maintain and enhance the quality of the environment; and the reasonably foreseeable needs of future generations.³¹ In that regard QLDC's 30 year infrastructure strategy must set out how QLDC will manage its infrastructure assets, including assets used to provide services in relation to sewerage and the treatment and disposal of sewage.³²
- (c) QLDC is required to assess the provision of water services (ie sewerage, treatment and disposal of sewage) in its district from a public health perspective including:³³
 - (i) the health risks to communities arising from any absence of, or deficiency in, water or other sanitary services; and
 - (ii) the quality of services currently available to communities within the district; and
 - (iii) the current and estimated future demands for such services; and
 - (iv) the extent to which drinking water provided by water supply services meets applicable regulatory standards; and
 - (v) the actual or potential consequences of stormwater and sewage discharges within the district.
- (d) QLDC must also continue to provide the water services that it provides, and maintain its capacity to meet its obligations.³⁴
- (e) If the Minister of Local Government believes that QLDC is failing to fulfil any of its duties under the Local Government Act 2002 or any other Act, she may intervene pursuant to Part 10 of the Act. This includes where there is a significant or persistent failure by the local authority to perform one or more of its functions or duties under any enactment.³⁵

³⁰ LGA, s 10.

³¹ LGA, s 14(1)(h).

³² LGA, s 101B(2) and (6).

³³ LGA s 125.

³⁴ LGA, s 130.

³⁵ LGA, s 256.

The Minister has a range of options to address the problem, including: requiring information from the local authority about the problem and how it is addressing or planning to address it;³⁶ or appointing various ministerial bodies (ie a Crown Review Team, Crown Observer, Crown Manager, or a Commission of Inquiry);³⁷ depending on the nature and scale of assistance or intervention required. In particular, the options are not intended to be hierarchical or sequential.

Health Act obligations

- (f) Under the Health Act 1956, QLDC has a duty to improve, promote, and protect public health within its district. In doing so QLDC must regularly inspect its district to ascertain if there are any nuisances, or any conditions likely to be injurious to health or offensive; and take proper steps to stop the nuisance or remove the condition:³⁸ “Nuisance” is where a watercourse, sanitary convenience, cesspool, drain, or vent pipe is in such a state or is so situated as to be offensive or likely to be injurious to health.³⁹ The Minister of Health may apply to the High Court to compel QLDC to perform a duty that it has failed to perform under the Act.⁴⁰
- (g) Section 30 of the Health Act provides that permitting or causing a nuisance is an offence against the Act. However, where pollution of a watercourse results from a breakdown of a sewerage scheme operated by a local authority, prosecution of the authority is not appropriate. Rather, the remedy for a person affected is either to seek an injunction in the High Court, or to apply to a District Court Judge for an order under s 33 of the Health Act that:⁴¹
 - (i) requires the local authority to abate the nuisance effectively;
 - (ii) prohibits the recurrence of the nuisance;
 - (iii) both requires the abatement and prohibits the recurrence of the nuisance; or
 - (iv) specifies the works to be done in order to abate the nuisance or prevent its recurrence, and the time within which they must be done.

³⁶ LGA, s 257.

³⁷ LGA, s 258-258L.

³⁸ Health Act 1956, s 23.

³⁹ Health Act 1956, s 29.

⁴⁰ Health Act 1956, s 123A.

⁴¹ *Nicholas v Matamata County* (1968) 12 MCD 289.

Appendix B: Summaries of case law on duration of consent

***Genesis Power Ltd v Manawatu-Whanganui Regional Council* [2006] NZRMA 536**

Genesis Power Ltd operated the Tongariro power development scheme (a hydro power scheme). In 2001, the Waikato and Manawatu-Wanganui Regional Councils granted further resource consents for the scheme for a period of 35 years. On appeal, the Environment Court reduced the term from 35 to 10 years, on the basis that the scheme adversely affected the cultural and spiritual values of Maori, and that a period of ten years would allow the parties to work towards a “meeting of the minds”, to identify specific Maori values that were being transgressed and then, through an application of technical methods, formulate appropriate mitigation measures.

The High Court found that the environmental effects of the scheme had been comprehensively studied over the course of its operation. That impact could confidently be expected to remain constant over the next 35 years. Subject to the change and evolution that may affect every culture and set of spiritual values, Maori culture and spiritual values will also remain constant over the next 35 years. There was no rational or reasonable basis to expect that proposals as to mitigation options would be made, let alone agreed, over the next ten years.

The appeal was allowed and the Environment Court decision quashed. The High Court’s decision was upheld on appeal by the Court of Appeal. . It held that a perceived lack of evidence does not provide a basis for making a decision to reduce the duration of a consent, in a manner which does not meet the Act’s sustainable management purpose. [The matter was remitted back to the Environment Court and the consent granted for a term of 35 years.](#)

***Te Rangatiratanga o Ngati Rangitahi Inc v Bay of Plenty Regional Council* (2010) 16 ELRNZ 312 (HC)**

This was an appeal against an Environment Court decision confirming 25-year resource consents for the operators of the Tasman Mill to take water from the Tarawera River and discharge treated wastewater, stormwater and landfill leachate. The Mill contended that the \$60 million expense of a new recovery boiler made the extended term essential.

The High Court adopted the approach taken in *Genesis Power Ltd* (above), asking how long would really be needed to achieve the relevant environmental improvements as against the need of the applicant for security of investment. It found that the Environment Court had concluded that the estimated capital investment in the Tasman Mill of \$100 million over 10 years meant that a term significantly longer than the five to eight years sought by the Society was appropriate. It was prepared to accept the appropriateness of a long-term consent if it was “intimately” linked to an ongoing reduction in river colour, moving toward an inconspicuous discharge at the date of termination. The High Court held that the Environment applied the correct legal test, putting in place a lesser term than the statutory maximum that sufficed to provide the applicants with security for present and future investment and appropriately rigorous consent conditions. The possible consequence of a shorter term was the closure of the Tasman Mill, which was inconsistent with the purpose of s 5 of the Act. The 25-year term confirmed was appropriate and the appeal should be dismissed.

A similar approach was adopted by the Court with regard to a significant tidal electricity generation proposal in granting a 35-year term of consent in *Crest Energy Kāipara Ltd v Northland Regional Council* [2011] NZEnvC 26, [2011] NZRMA 420.

PVL Proteins Ltd v Auckland Regional Council EnvC Auckland A061/01, 3 July 2001

The Regional Council granted PVL and Auckland Meat Processors Ltd resource consent to discharge contaminants to air from a slaughterhouse/rendering plant, for ten years. PVL and AMP appealed the term, and instead sought a term of 35 years.

The Environment Court reviewed a line of cases dealing with the appropriate term of a consent, and the power to review terms and conditions in the context of consents for discharge to air. The Court observed that:

[27] A decision on what is the appropriate term of the resource consent is to be made for the purpose of the Act having regard to the actual and potential effects on the environment and relevant provisions of applicable instruments under the Act, the nature of the discharge, the sensitivity of the receiving environment to adverse effects, the applicant's reasons and any possible alternative methods of discharge, including to another receiving environment.

[28] Relevant factors in making a decision on the term of the resource consent include that conditions may be imposed requiring adoption of the best practicable option, requiring supply of information relating to the exercise of the consent requiring observance of minimum standards of quality in the receiving environment, and reserving power to review the conditions.

...

[30] Uncertainty for an applicant of a short term, and an applicant's need (to protect investment) for as much security as is consistent with sustainable management, indicate a longer term. Likewise, review of conditions may be more effective than a shorter term to ensure conditions do not become outdated, irrelevant or inadequate.

[31] By comparison, expected future change in the vicinity has been regarded as indicating a shorter term. Another indication of a shorter term is uncertainty about the effectiveness of conditions to protect the environment (including where the applicant's past record of being unresponsive to effects on the environment and making relatively low capital expenditure on alleviation of environmental effects compared with expenditure on repairs and maintenance or for profit).. In addition, where the operation has given rise to considerable public disquiet, review of conditions may not be adequate, as it cannot be initiated by affected residents.

[32] The Regional Council submitted that an activity that generates known and minor effects on the environment on a constant basis could generally be granted consent for a longer term, but that one which generates fluctuating or variable effects, or which depends on human intervention or management for maintaining satisfactory performance, or relies on standards that have altered in the past and may be expected to change again in future should generally be granted for a shorter term.

On the facts, the Court considered the consent should only be granted for a 14 year term because:

- (a) The applicants had shown a commitment to minimising the effects of emissions at the plant.

The risk of adverse effects could be appropriately responded to by the power of review.

- (b) The receiving environment could change, but this needed to be balanced against the appellants' need for security for investment and future development. The Court considered a term as long as 15 years would be adequate security for the community against change in the receiving environment.

- (c) Factors favouring a term of consent longer than ten years were the appellants' considerable investment in their current technology, which was the best practicable option, the location in an appropriate zone, the relatively rare and transitory environmental effects, and the ability to review the conditions.

The Court could not determine what the difference in effects might be between the appellants' current technology and any hypothetical technology that might be developed in the future, and the possibility of new technology did not indicate a need for a term as short as ten years

Te Maru O Ngati Rangiwewehi v Bay of Plenty Regional Council (2008) 14 ELRNZ 331 (EnvC)

The Rotorua District Council had applied for resource consent, to replace an expiring permit, to take water from Taniwha springs at an increased rate. The Bay of Plenty Regional Council granted consent, for a term of 25 years, but at a volume and rate less than applied for. The District Council appealed, seeking a higher volume and rate. *Te Maru O Ngati Rangiwewehi* also appealed, seeking a reduced term for the consent.

The Court found that the District Council had failed to adequately consider alternatives for public water supply which would not have significant adverse effects on Maori and reduced the term of the consent from 25 years to 10 years in order to provide sufficient time for the council to investigate alternative water supply options.

Royal Forest and Bird Protection Society of NZ Inc v Waikato Regional Council [2007] NZRMA 439 (EnvC)

The Court considered the appropriate term of a coastal permit allowing removal of mangrove seedlings.

It held that reducing the duration of the consent as a means of influencing public authorities to take action on related environmental issues was not appropriate. Duration of consent should be determined primarily by sound resource management practice and the Act's sustainable management purpose.

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.

Bright Wood NZ Ltd v Southland Regional Council EnvC C143/99

The Regional Council had granted resource consents to Bright Wood to discharge contaminants to air from a timber processing operation and discharge treated stormwater from that operation into an unnamed Tributary. Both consents were granted for a term of 15 years as opposed to the consent term of 25 years sought by the Bright Wood. Bright Wood sought an order extending the consent period from 15 to 25 years in respect of both consents.

The Court observed that “to protect its investments on the site Bright Wood is entitled to as much security of term as is consistent with sustainable management.” The Court had regard to:

- (a) the level of adverse effects from the activities on the site;
- (b) the ability of the Council to review consent conditions under s 128 of the Act;
- (c) the economic life of the operation (the kilns had an economic life of about 25 years);
- (d) the prospect of further and continued investment;
- (e) the site history and current zoning.

The Court considered that any adverse effects from the air discharge could be avoided or remedied by review conditions. The Court was more concerned about the stormwater consent because there was copper, chrome and arsenic on the site, which could potentially find its way into the stormwater system. It considered that the issue should be revisited in 15 years. It noted that there may be techniques developed for contaminated sites within 15 years which would enable complete containment of the pollutants as the proper approach to cleaning up contaminated sites was “still evolving”. The Court increased the term of the air discharge consent to 25 years, but retained the 15 year term for the stormwater consent.

Brooke-Taylor v Marlborough District Council W067/04.

This was an appeal against conditions in a consent to construct a combined fixed and floating jetty with attached boatshed, decking and ramp at the Northeast corner of Horseshoe Bay, due east of Maud Island, in the Pelorus Sound. The appellant’s application sought a 35-year term of consent but the District Council only granted a 10-year consent, based on “a matter which has been agreed upon with iwi and accordingly has meant that no submissions in opposition are lodged for coastal permits by the iwi concerned”.

The Court held that a blanket expiry term of 10 years was misdirected. It considered that the 10-year limitation failed at least two of the *Newbury* tests, in that:

- (a) The condition is related to Maori ownership of the seabed issues not adverse effects on the environment.
- (b) The condition therefore does not fairly and reasonably relate to the activity authorised by the consent - namely the buildings and the jetty and the effect on the environment of the term of occupancy.

The Court held that an appropriate term would be no greater than 20 years.