

**Before the Hearing Commissioners appointed by Hawke's Bay
Regional Council**

In the matter of the Resource Management Act 1991
(the Act)

And in the matter of applications APP-123534, APP-123548, APP-123526, APP-123550, APP-123535 & APP-123536 by the Regional Assets Section, Hawke's Bay Regional Council to remove gravel and undertake other earthworks at various locations along the Ngaruroro River, Tukituki Catchment Rivers and Tūtaekurī River to the coast

Reply submissions of counsel for the Applicant

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INTRODUCTION

Hearing Panel's Direction

- 1 Prior to the hearing being adjourned on 10 December 2021, the Hearing Panel directed the parties to confer and agree on a timetable for the applicant to revise the draft conditions of consent and for the parties' planning witnesses to then attend expert conferencing with the objective of reaching consensus on an agreed set of conditions. The applicant's written reply was to follow shortly thereafter.

PLANNING EXPERTS' CONFERENCING

- 2 The applicant circulated a new set of conditions taking into account the matters the Panel had raised during the hearing on 4 February 2022.
- 3 The planning witnesses for the parties first met on 2 March 2022 for expert witness caucusing. Alison Francis of Bay Planning Limited was engaged to facilitate the further caucusing meetings which were held on 25 March, 21 April, 10 May and 19 May 2022.
- 4 The planning witnesses for the parties have produced a joint witness statement and a draft set of conditions for each of the Tukituki River¹, Ngaruroro River² and Tūtaekurī River³ gravel extraction consents. Those documents have been provided to the Hearing Panel separately.
- 5 The conditions on which the parties disagree are highlighted in yellow in each draft conditions set. The reasons for the experts' disagreement are set out in the joint witness statement.

¹ AP-123526 and APP-123535

² APP-123548 and APP-123550

³ APP-123534 and APP-123536

REMAINING AREAS OF DISAGREEMENT

6 At the conclusion of the hearing the most significant areas of disagreement between the parties and/or their experts related to:

6.1 The terms of reference for the Kaitiaki Liaison Groups and their role. In large part these concerns are addressed by proposed conditions 17-20 of the Tukituki Catchment Rivers consent, on which the planners are agreed.⁴ It is agreed that the groups formerly known as Kaitiaki Liaison Groups will, following further input from submitters, now be called Tangata Whenua Operations Management Groups (Tangata Whenua Groups). However the number of such Groups remains in contention. The submitters want an increase in the number of Tangata Whenua Groups from two to four, and more members in the two new Groups. The applicant does not agree to that.⁵

6.2 Scope and whether the submitters could raise matters such as effects on natural character and hydrology of the rivers, loss of instream habit through decrease in braided areas and effects on natural groundwater recharge zones when:

- (i) The original submissions made by Ngāti Kahungunu Iwi Incorporated (**NKII**) and Te Taiwhenua o Heretaunga (**TToH**) made no mention of those effects; and
- (ii) Those matters did not relate to any of the matters for discretion under Rules 74 of the Regional Resource Management Plan (**RRMP**) and 61 of the Regional Coastal Environment Plan (**RCEP**).

⁴ For the purposes of this Reply, all reference will be to the Tukituki Catchment Rivers conditions set. The numbering of conditions in the Ngaruroro and Tutaekuri Rivers consents differs slightly.

⁵ See condition 14 in the Ngaruroro River consent the Tutaekuri River consent LJB-003502-387-574-V2

The draft conditions set includes conditions which address these concerns – see for example draft conditions 53(II), 54(a), 69, 78(e) and 80. All of the agreed conditions are proffered by the applicant and so can be imposed by the Hearing Panel without the need for a decision as to scope.

- 6.3 Whether the activity was occurring within the bed of the river. That is a legal matter rather than a matter for the planning experts. It is addressed later in this Reply.
- 6.4 Whether the applications or the proposed consent conditions adequately addressed cultural impacts. Cultural impacts are addressed in proposed conditions 14-19, 22, 53-55, 60-66, 78(d) and (e), and 80(e).
- 6.5 The term of the resource consents.

7 As a result of expert witness conferencing the issues have narrowed further. The primary matters on which the parties and the planners continue to disagree are:

- 7.1 The term of the resource consents.
- 7.2 Proposed condition 13 of the conditions set for the Tukituki Catchment Rivers⁶ which has been proposed by Ms Wilson and its requirement that the consent holder enter into a Memorandum of Understanding or Partnership with the parties listed in condition 15 and 16, namely TToH, Te Taiwhenua o Tamatea, Heretaunga Tamatea Settlement Trust and NKII.
- 7.3 The number of Tangata Whenua Groups and the number of members in each Group.

⁶ Condition 12 for the other consents
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7.4 Proposed condition 22(b), which currently requires the consent holder to avoid causing any significant adverse effects on waahi tapu. Ms Wilson proposes that this clause refer to ‘waahi taonga including waahi tapu’.

7.5 Proposed conditions 56-59 which, if imposed, would require the consent holder to engage suitably qualified tangata whenua to prepare a Cultural Impacts Assessment (CIA) or a Cultural Aspirations Report (CAR) for all rivers within the proposed consent areas within 18 months of the consents commencing.

8 Those issues are addressed in turn below.

Term

9 The applications lodged with HBRC sought a term of 25 years. The applicant now seeks a term of 20 years, having offered this during pre-hearing discussions. The submitters ‘tentatively agree’ to a consent term of 20 years ‘as long as the conditions remain largely unchanged as a result of the final discussions with all parties’. The applicant understands this to mean that the submitters agree to a consent term of 20 years only if the applicant accepts all of the conditions the submitters now seek. As that is not the case (for reasons which are set out below), the submitters seek a consent term of 10 years.

10 Neither the submitters’ evidence nor the joint witness statement explains why the submitters are seeking a maximum duration of 10 years if they do not get everything they want.

11 *Genesis Power Limited v Manawatu-Wanganui Regional Council*⁷ is relevant here. It was an appeal against the Environment Court’s decision to reduce the term of consents granted for the Tongariro power development scheme (**the TPD**) from 35 years to 10 years, rather than to impose a review

⁷ [2006] NZRMA 536
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condition. The Environment Court saw the 10-year term as a means of drawing the opposing parties together and concentrating their minds on identifying the adverse effects of the TPD on Māori interests and on ways of mitigating those effects. On appeal in the High Court that decision was quashed. The High Court observed that:⁸

In a situation where adverse effects on the Maori respondents have been identified, but appropriate measures to mitigate them have not, to limit the resource consents to 10 years is indeed to wield a blunt instrument.

- 12 In the subsequent appeal to the Court of Appeal the majority approved the High Court decision and held that the Environment Court's decision to shorten the term of the consent had been illogical and unreasonable.
- 13 The comments made by William Young P in that decision are apposite here:⁹

I cannot see a credible basis for concluding that an appropriate duration for the consent was only ten years. It is, for instance, inconceivable that the Environment Court considered that the TPD should cease operating at the expiry of its ten-year consent. So the key issue was mitigation. Although I do not see the case as turning on an onus of proof on the iwi parties, their lack of engagement and the proffer by Genesis of an apparently viable mechanism (the review condition) are important considerations. In the normal course of events these considerations would be likely to have resulted in a 35-year term along with a review condition. In any event, given that the case was about mitigation, it is difficult to see what was wrong with the review condition suggested by Genesis.

- 14 These applications seek consent for an existing activity which has been carried out for decades as part of essential maintenance for established flood control schemes. The effects of the activity are not new. They are addressed through the proposed consent conditions and the various management plans and the monitoring that those conditions require. It is inconceivable that the activity would cease operating after 10 years; the flood control schemes under this consent application protect more than 60,000 hectares of land and 130,000 people. In practice the activity would

⁸ Para [89]

⁹ *Ngati Rangī Trust v Genesis Power Ltd* [2009] NZCA 222, para [44]
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likely return to the way it is operated now i.e. short term resource consents issued directly to commercial operators. The applicant has proposed to move away from this existing system, in large part to better manage the effects of the activity.

- 15 In *PVL Proteins Limited v Auckland Regional Council*,¹⁰ the Court held that the economic effects of a particular consent term on a consent holder is a relevant factor to be considered.
- 16 This consenting process has imposed a significant financial burden on the applicant, but should result in an improved management regime and better management of any actual and potential adverse effects of gravel extraction. That can be contrasted with the current system, in which gravel extractors are required to secure their own resource consents which operate without most of the conditions the applicant is currently offering.
- 17 The current practice works well and benefits the Hawke's Bay community because it functions on a cost recovery basis. Whether that can continue in the long term remains to be seen - already the volumetric charges paid by the gravel extractors to the council to recover the direct costs associated with the gravel extraction activity has increased from 80c/m³ to \$1.20m³ in response to the costs associated with this consenting process.
- 18 If the consent is granted for the 10-year term sought by the submitters, the applicant will have to apply for further consents in 10 years' time, potentially for no better environmental outcome but far greater cost. This cost which has so far been recovered from gravel extractors may prove too high for that to continue. If the volumetric charges to gravel extractors make gravel extraction from the rivers uneconomic, those extractors will turn to land-based extraction for their gravel needs. If that were to happen, the cost of the gravel extraction maintenance activity would have to be

¹⁰ A061/01
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borne by Scheme beneficiaries, which would result in a significantly increased rates burden on the Hawke's Bay community.

- 19 These resource consents are the outcome of a process which started in 2010.¹¹ The level of expenditure that is required both to obtain the resource consents and then to implement the proposed agreed conditions also warrants a much longer term than 10 years.
- 20 The aim throughout has been a better, more secure and consistent consenting model that can more holistically and effectively manage environmental effects and provide for longer term authorisations for gravel extractors. If HBRC's flood protection scheme is to continue to operate in the way it has, the gravel extractors also need certainty so that they can make informed decisions about whether to invest in processing plants and the like.
- 21 The proposed agreed consent conditions enable and require changes to practices to be made to reduce adverse effects on the environment. For example, condition 78 requires the consent holder to submit a report to the consent authority five years after the consent comments and every five years thereafter which reviews:¹²
- a. Any new relevant regulations, research, investigations or other material.
 - b. The results of monitoring undertaking under this permit.
 - c. Whether any effects have been identified as a result of activities authorised by this permit that are more significant than expected.
 - d. Discussions and agreed minutes with the Heretaunga Gravels Tangata Whenua Group and the Tamatea Gravels Tangata Whenua Group.
 - e. Recommendations including any practices or activities that should be avoided or modified to reduce any adverse effects on

¹¹ In 2010 the Applicant commissioned an independent report to review the way it managed gravel for flood control purposes (Scoping Report: Review of Riverbed Gravel Management, November 2010 T&T Ref. 85047 This review presented 13 recommendations, which the Applicant responded to through a significant body of work over 8 years, and that led directly to these resource consent applications being lodged almost 5 years ago.

¹² Condition 78 of the Tukituki Catchment Rivers consent.
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the environment (in particular groundwater), climate change and cultural and Tangata Whenua values.

- 22 The consent holder must provide an annual report which addresses (amongst other things):
- 22.1 A summary of all results of monitoring;
 - 22.2 A description of any potential and adverse effects that have been identified and how the effects were mitigated; and
 - 22.3 Recommendations for improvements.
- 23 The applicant has also proffered a comprehensive review condition which enables the consent authority to review the consent on an annual basis for any of the following purposes:¹³
- a. To deal with any adverse effect on the environment and cultural values (including mauri and mahinga kai) which may arise from the exercise of [the] consent, which it is appropriate to deal with at that time, or which became evident after the date of issue.
 - b. To require the adoption of the best practicable option to remove or reduce any adverse effects on the environment and cultural values (including mauri and mahinga kai).
 - c. To take into account the results from monitoring (including cultural monitoring), modify any monitoring programme, or to require additional monitoring if there is evidence that current monitoring requirements are inappropriate or inadequate to address adverse effects of the consented activities.
 - d. To deal with findings of the monitoring programmes undertaken in accordance with this consent.
 - e. To address any matters raised in the reports prepared under Conditions 77 and 78.
 - f. To address any relevant matters required under the Climate Change Response (Zero Carbon) Amendment Act 2019 such as the emissions reduction plan.
- 24 Section 8.2.4 Consent Duration in the RRMP states that the Regional Council will grant resource consents for activities other than land use

¹³ Condition 80
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consents under s9 RMA and reclamations pursuant to s13 for a period of 20 to 35 years unless:

- 24.1 The activity has a duration of less than 20 years, in which case a consent will be granted for the duration of the activity; or
- 24.2 The type of activity has effects that are unknown or potentially significant for the locality in which it is undertaken.

The first proviso does not apply here; the applicant seeks a consent with a 20 year duration. The second proviso does not apply either; any effects of the activity which are currently unknown have been addressed through the monitoring and other measures proposed in the agreed conditions.

- 25 The commentary at section 8.2.5.1 of the RRMP (dealing with consent review) states:

A review of consent conditions will be the preferred means (as opposed to a short-term consent) for:

- (a) Dealing with any adverse effect on the environment which may arise from the exercise of the consent and which it is appropriate to deal with at a later stage. This type of review will be invoked only where a more than minor change in adverse effects, or any unanticipated significant effect, arises during the exercise of the consent.

- 26 Rather than imposing a shorter term, the better approach would be for the Panel to impose a more robust review condition (if there is any uncertainty about the robustness of the one proposed by the parties).

- 27 For all of those reasons Mr Bendall recommends a consent duration of 20 years. Mr Exeter agrees.

Tangata Whenua Groups

- 28 Earlier this week, on Monday 23 May, the submitters advised (through Ms Wilson) that they want four Tangata Whenua Groups to be established (rather than two), with more members.
- 29 From the applicant's perspective (and Mr Bendall's), this was a late-breaking change. There has been ample time through the submissions phase, pre-hearing meeting process and now the expert witness conferencing (which has involved five meetings of the planners) for the submitters to raise this issue squarely with the applicant and in good time for there to be a proper discussion about the merits (or not) of that proposal.
- 30 By way of background:
- 30.1 Both submitters first requested the establishment of a Māori Liaison Group in their submissions. The applicant agreed to that and proffered it as a condition.
- 30.2 Through pre-hearing discussions, the submitters proposed that two groups be established to recognise the global nature of the consents and different hapū interests within the proposed consent areas; a Heretaunga Gravels Kaitiaki Liaison Group and a Tamatea — Heretaunga Gravels Kaitiaki Liaison Group. This was agreed by the applicant and proffered as a revised condition, with the understanding that the MoU (which was in development at that time) would provide the detail of how those groups would be formed and operate.
- 30.3 At the hearing, both the submitters and the Hearing Panel requested that more detail be brought into the conditions to clarify the formation, purpose and objectives of the two Kaitiaki Liaison Groups, rather than relying on the MoU for those matters. Mr Bendall agreed to develop proposed conditions for further

discussion. These were circulated on 4 February 2022 as directed by the Panel.

- 30.4 Through subsequent caucusing, the submitters requested that the two groups instead be called Tangata Whenua Operations Management Groups. This change was made, alongside a raft of changes to the objectives and purpose of the groups, including clarifying that each group would be formed by up to 6 tangata whenua members, 2 members appointed by the consent holder, and an independent facilitator.
- 30.5 Post-caucusing, on 23 May the submitters through Ms Grey requested further changes as follows:
- (a) For the Ngaruroro Consent, the establishment of a Ngaruroro Tangata Whenua Group with up to 10 tangata whenua members, 2 members appointed by the consent holder and an independent facilitator.
 - (b) For the Tukituki Consent, the establishment of a Heretaunga Gravels Tangata Whenua Group with up to 6 tangata whenua members, 2 members appointed by the consent holder and an independent facilitator.
 - (c) Also for the Tukituki Consent, the establishment of a Tamatea Gravels Tangata Whenua Group with up to 6 tangata whenua members, 2 members appointed by the consent holder and an independent facilitator.
 - (d) For the Tūtaekūri Consent, the establishment of a Tūtaekūri Gravels Tangata Whenua Group with up to 8 tangata whenua members, 2 members appointed by the consent holder and an independent facilitator.

31 In the Joint Witness Statement, Mr Exeter and Mr Bendall have noted the challenges with this late change. The applicant has since confirmed that it does not agree to those changes, for the following reasons:

31.1 The submitters have provided no explanation as to why they consider four Groups are required.

31.2 It is efficient and effective to have two groups representing the hapū interests within the proposed consent areas or, to put the matter another way, one group for each scheme.¹⁴

31.3 It is an administrative and financial burden on the applicant to establish two additional groups for no obvious benefit.

32 The applicant will agree to the following consent conditions:

The Heretaunga Gravels Tangata Whenua Group shall be comprised of:

- a. Up to 2 members appointed by Te Taiwhenua o Heretaunga;
- b. Up to 2 members appointed by the Heretaunga Tamatea Settlement Trust;
- c. Up to 2 members appointed by Ngati Kahungunu Iwi Incorporated; and
- d. Up to 2 members appointed by the Consent Holder.
- e. An independent facilitator; and
- f. Any additional members as agreed by consensus of the members of the group.

The Tamatea Gravels Tangata Whenua Group shall be comprised of:

- a. Up to 2 members appointed by Te Taiwhenua o Tamatea;
- b. Up to 2 members appointed by the Heretaunga Tamatea Settlement Trust;
- c. Up to 2 members appointed by Ngati Kahungunu Iwi Incorporated; and
- d. Up to 2 members appointed by the Consent Holder.

¹⁴ The consent applications collectively seek to enable gravel extraction from the rivers within the Heretaunga Plains Flood Control and Drainage Scheme and the Upper Tukituki Flood Control Scheme

- e. An independent facilitator; and
- f. Any additional members as agreed by consensus of the members of the group.

33 If additional hapū representation is required, this is provided for in the condition (sub-clause (f)).

Proposed condition 13 - Memorandum of Understanding or Partnership

34 In addition to the detailed agreed proposed conditions addressing the objectives, purpose and membership of the Tangata Whenua Groups, the submitters want a condition requiring the consent holder to enter into a Memorandum of Understanding or Partnership with the following parties:

34.1 For the Tukituki Catchment Rivers gravel extraction consent, TToH, Te Taiwhenua o Tamatea, Heretaunga Tamatea Settlement Trust and NKII; and

34.2 For the Tūtaekūri River consent, Mana Ahuriri Trust, Te Taiwhenua O Te Whanganui-a-Orotū, Nga Hapu of Tūtaekūri and NKII; and

34.3 For the Ngaruroro River consent, TToH, Heretaunga Tamatea Settlement Trust, Mana Ahuriri Trust, Taiwhenua O Te Whanganui-a-Orotū and NKII.

35 Condition 13 as proposed by the submitters requires the establishment of a Memorandum of Understanding or Partnership 'before the rest of the conditions progress'.¹⁵

36 The applicant agrees that there is merit in developing a Memorandum of Understanding (**MoU**). A draft MoU has been prepared and is well-advanced. The concern is having a condition requiring the parties to enter into a MoU, particularly if (as Ms Wilson contends in the joint witness statement) the Memorandum of Understanding or Partnership must be

¹⁵ Joint Witness Statement dated 26 May 2022, para 12
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signed 'before the rest of the conditions progress'. The implications then of a further stalemate are significant and risk frustrating the consents.

- 37 The proposed consent conditions should stand or fall on their merits. It is not good resource management practice to impose a condition requiring agreement to be reached with a third party, especially when such a condition, operating as Ms Wilson proposes, could have the effect of frustrating the consent.
- 38 As Mr Exeter contends in the Joint Witness Statement, if the MoU condition is removed, the consent can stand by itself. His statement neatly illustrates the point that the proposed condition is not necessary.

Proposed Condition 22(b) – waahi tapu or waahi taonga?

- 39 Proposed condition 22(b) requires the consent holder to avoid causing any significant adverse effects on waahi tapu. Ms Wilson proposes that this clause refer to 'waahi taonga including waahi tapu' in order to achieve consistency with terminology used in the partially operative Hastings District Plan.
- 40 Both Mr Exeter and Mr Bendall have concerns about the broadness of the term waahi taonga; if this encapsulates the entire river system including the bed, then it is uncertain how the effects of gravel extraction could be considered or assessed. Mr Bendall proposes alternative wording to refer to the waahi taonga sites and sites of significance to tangata whenua identified in Appendix A to the conditions. That approach gives the consent authority, consent holder and the submitters certainty about how and where significant sites will be protected.

Proposed conditions 56-59 - Cultural Impacts Assessment / Cultural Aspirations Report

- 41 Proposed conditions 56-59, if imposed, would require the consent holder to engage suitably qualified tangata whenua to prepare a Cultural Impacts

Assessment (**CIA**) or a Cultural Aspirations Report (**CAR**) for each river within 18 months of the consents commencing.

42 This condition seems to be driven by the submitters' wish to undertake a CIA/CAR for the purposes of these consents 'to ensure that their values and relationships with the awa and the surrounding environments, within the context of the proposed activities, are recorded', which in turn helps to ensure that section 6(e) of the RMA is recognised and provided for.¹⁶

43 There are a number of points to be made in relation to that:

43.1 There is nothing to prevent the submitters from undertaking a CIA/CAR to record their values and relationships with the awa and the surrounding environments. They do not need a consent condition for that.

43.2 Section 6(e) matters – the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga – to the extent that they are relevant are already addressed through other consent conditions: see for example conditions 18, 19, 22, 24, 53(II), 54(a), (d) and (e), and 60-66.

43.3 It is unclear what a CAR is and what it could achieve beyond the existing agreed proposed conditions.

43.4 It is unlikely that such reports, required for all three consents could be completed within the 18-month timeframe required by the proposed conditions. As Mr Bendall notes, recent experience involving a CIA for the Clive River dredging proposal highlighted the capacity constraints of suitably experienced tangata whenua capable of producing such reports. Experts with a good reputation are sought after and many already have more work than they can reasonably complete.

¹⁶ Joint Witness Statement, para 13
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43.5 Proposed agreed condition 19(p) enables the Tangata Whenua Operations Management Groups to commission and direct site-specific CIAs if/as required. A more focused approach will enable the management of cultural effects on an ongoing, practical and responsive manner.

OTHER MATTERS RAISED DURING THE HEARING

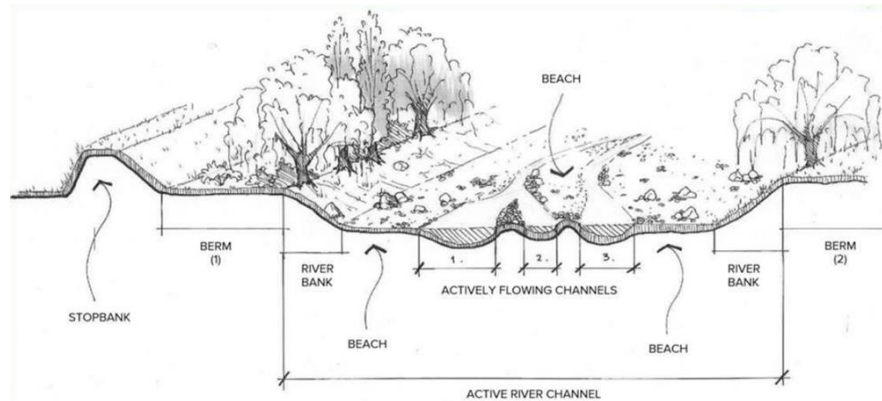
Bed of a river

- 44 In opening submissions made on behalf of the applicant I cited the Court of Appeal's decision in *Canterbury Regional Council v Dewhurst Land Co Limited*.¹⁷ In that case the Court held that the interpretation of 'bed' required the determination of the fullest flow of the river, but that a river's 'fullest flow' was something less than the point where it floods. The Court also endorsed the principle invoked by Gendall J (in the High Court) that the bed of a river comprises those lands covered by water during the ordinary rainy season, but contained within the banks of the river and extending from bank to bank.
- 45 During the hearing, Commissioner Cooney expressed concern that the definition of 'bed' being advanced by the applicant included flood flows that transport gravel and sediment.
- 46 The first point in relation to that is that gravel and other sediments are transported from the Ranges at times of higher flow, but which fall short of a major flood event. Such material can be transported during the mean annual flood. During the mean annual flood, the waters extend from the toe of the stopbank on one side to the toe of the stopbank on the other side in many locations along the rivers which are the subject of these applications.

¹⁷ [2019] NZCA 486
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- 47 Figure 1 which appears on page 2 of each of the draft condition sets is included below. It has been included here to illustrate the location of the berm in relation to the toe of the stopbank.

Figure 1: Definitions of terms used in these consent conditions



- 48 The consent applications seek consent for the extraction of gravel from the active river channel and the berm areas. The active river channel is defined diagrammatically and also in the definitions provided at the beginning of each condition set as:

The entire length of the river channel including gravel beaches, actively flowing channels, and riverbanks, but excluding berms, as shown in Figure 1.

- 49 The definition of 'berm' contained in the draft resource consents is:

Land between the active river channel and the stopbank or naturally elevated land that forms part of the floodplain.

- 50 The mean annual flood is an event expected in 'the ordinary rainy season'. It is not considered to be a major storm (the flows from which are excluded from the concept of the 'fullest' flow for the purposes of the definition of 'bed').
- 51 Given that the waters extend, in a mean annual flood from the toe of the stopbank of one side of the river to the other, the bed of the river includes the active river channel, the beaches and the berm which is immediately adjacent to the toe of the stopbank.

- 52 If however the Hearing Panel forms a different view about that, the applicant has confirmed whether additional consents would be required from the district councils.

Central Hawkes Bay District Council

- 53 In his summary and supplementary evidence dated 8 December 2021, Mr Bendall explained that the applicant had applied for resource consent under the Operative Central Hawke's Bay District Plan for consent to extract gravel, including from Areas of Significant Nature of Conservation value.

- 54 That resource consent was issued on 16 December 2021 (Reference RM200022) and grants:

land use consent to undertake beach raking and the extraction of gravel (defined as gravel and associated sand, silt and other riverbed sediments) from the river beds Tukituki River, Waipawa River, Makaretu River, Mangaonuku Stream, Tukipo River, comprising the active river channel **and berms** (Tukituki Catchment Rivers). (Emphasis added)

A copy of that resource consent is attached to this reply.

Hastings District

- 55 As explained in Mr Bendall's summary and supplementary evidence dated 8 December 2021, the Hastings District Plan has permitted activity rules for gravel extraction undertaken for flood control purposes. Those permitted activity rules include Rule EM4 which provides that the following activity is a permitted activity:

The removal of river berm silt, gravel or other river control or drainage works carried out by a local or regional authority, exercising its powers, functions and duties under The Soil Conservation and Rivers Controls Act 1941, or The Land Drainage Act 1908 and ancillary activities involved with the relocation of the extracted material.

- 56 It also includes in its Natural Hazards chapter Rule NH1 which provides that the following is a permitted activity:

Natural Hazard Mitigation Activities including River Control and Drainage Works in the River Hazard Overlay carried out by or on behalf of a Local Authority, Network Utility Operator or a Requiring Authority Exercising its Powers, Functions and Duties Under the Resource Management Act 1991, Soil Conservation and Rivers Control Act 1941, or Land Drainage Act 1908.

- 57 The definition of Natural Hazard Mitigation Activities is as follows:
- Means activities that are carried out by a Network Utility Operator to reduce the risks posed by natural hazards to human life, property or the environment (includes stopbanks, sea walls, vegetation planting).
- 58 The applicant’s gravel extraction activities are river control and drainage works which it is empowered to carry out under the Land Drainage Act 1908 (**LDA**) and the Soil Conservation and Rivers Control Act 1941 (**SCRCA**). Those Acts confer upon the applicant the power to:
- 58.1 Cleanse, repair or otherwise maintain any watercourse ‘in a due state of efficiency’;¹⁸
- 58.2 Deepen, widen, or otherwise improve any watercourse, or remove any obstructions to the free flow of flood waters in existing flood channels;¹⁹ and
- 58.3 Maintain all works and do any acts as may be necessary or expedient for preventing or lessening any likelihood of the overflow or breaking of the banks of any watercourse.²⁰
- 59 Those powers are broadly expressed and are not confined to the definition of a riverbed. The permitted activity rules in the Hastings District Plan (partially operative) – Rule EM4 and NH1 - list river control and drainage works as permitted activities where they are carried out by a Regional Authority exercising powers under the SCRCA or the LDA. No land use

¹⁸ Section 133 Soil Conservation and Rivers Control Act 1941, s17(a) Land Drainage Act 1908

¹⁹ Section 133(1)(b) SCRCA and s17(b) LDA

²⁰ Section 126(2) SCRCA

consents are required from that council for gravel extraction along the river's berms.

- 60 The purpose of these resource consent applications is to manage the extraction of gravel, whether from the beaches or the berms, in a holistic fashion and with a suite of conditions which are far more comprehensive than the conditions attached to the 1-year resource consents currently granted to gravel extractors. If gravel extraction from the berms is excluded from these resource consents, it can nonetheless be carried out as a permitted activity, and with less oversight than is provided by the agreed proposed consent conditions. That is not an outcome anybody wants.

Stockpiling

- 61 Commissioner Green asked whether the activity of stockpiling was considered part of the gravel extraction activity.
- 62 As explained in Mr Bendall's statement of evidence, resource consents are required under Rule 74 of the RRMP and Rule 61 of the RCEP. Both rules list matters for discretion which include location of extraction sites and stockpile areas.²¹ The stockpiling of gravel is addressed in the proposed consent conditions. Condition 27 contemplates gravel stockpiling within the active river channel occurring only temporarily, while extraction is being carried out in the immediate area. Condition 29 deals with site restoration on completion of the gravel extraction operation. Any gravel which has been heaped up in the gravel removal process will be spread out when gravel extraction activities in that area come to an end.
- 63 Importantly, the applications do not seek consent for post-extraction gravel processing.²² This is because the Applicant is only concerned with the removal of gravel from the rivers for flood control purposes (see new

²¹ Statement of evidence of Simon Bendall, paras 86 and 89

²² Summary and supplementary evidence of Chris Dolley dated 8 December 2021, para 31
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condition 3) and has no interest or involvement in any subsequent commercial activity, including gravel processing. If a gravel extractor wishes to undertake gravel processing – an activity which will necessarily involve gravel stockpiling outside of the river, they must get any necessary resource consents for that gravel processing and related activities from the appropriate District Council.

Access paths to river

64 These applications do not seek consent for the construction of new accessways or roads. It is expected that existing accesses will be used to gain access to the river for the gravel extraction activities authorised by the resource consents. That is now reflected in proposed consent condition 30 which states:

The consent holder shall only use authorised access paths for access to the river for gravel extraction activities as far as reasonably practicable.

65 If in the future, a new accessway or road is required for which a resource consent is needed, the resource consent would be sought at that time. This may occur as the availability of gravel shifts and changes through the river system.

Management Plans

66 The Hearing Panel's direction of 18 December 2021 directed that the conditions set produced by the planners following conferencing include conditions detailing management plans with defined objectives or requirements as a means of dealing with important operational requirements under the resource consents.

67 That has been done. The conditions set produced by the planners requires the consent holder to prepare an operational management plan (**OMP**)²³

²³ Conditions 53-55
LJB-003502-387-574-V2

and Mātauranga Māori Monitoring Plan (**MMMP**²⁴, a Mauri Enhancement Plan (**MEP**)²⁵ and site-specific Spill Management Plans (**SMP**).²⁶

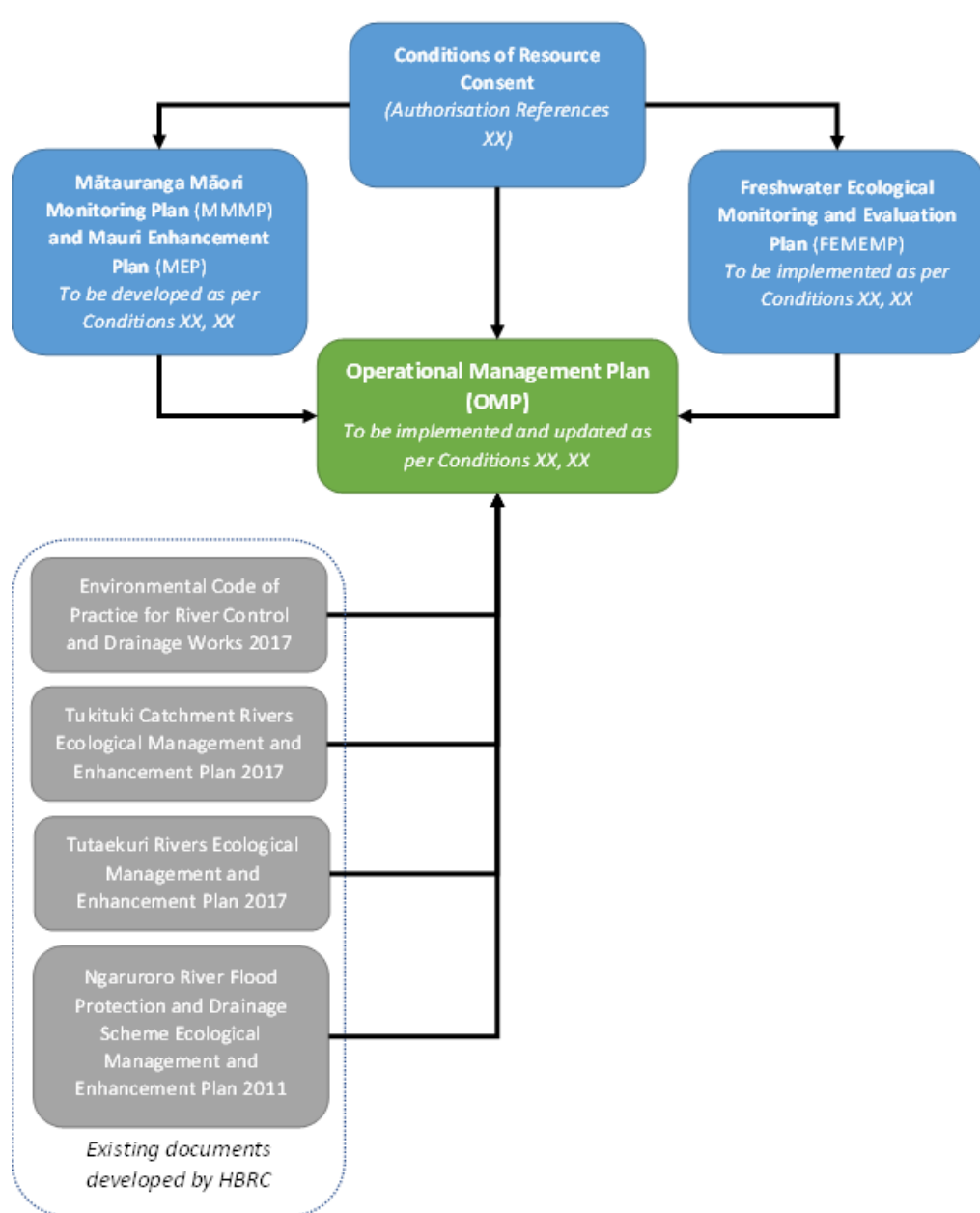
- 68 The OMP must be certified according to the process set out in conditions 46-52 and reviewed at least every five years or following any significant changes to operations or best practice.²⁷
- 69 The intent is that the OMP reflects the key requirements of the Code of Practice and each of the existing Ecological Management and Enhancement Plans, as they relate to the activity of gravel extraction. The OMP will also be updated over time to reflect the outcome of monitoring undertaken through the Freshwater Ecological Monitoring and Evaluation Plan (**FEMEP**), the MMMP and the MEP. That is illustrated diagrammatically in the figure below.

²⁴ Conditions 60-63

²⁵ Conditions 64-66

²⁶ Condition 67

²⁷ Condition 55



70 The applicant has developed a draft OMP which was circulated to the parties on 18 March in accordance with Hearing Panel Direction No. 2.

71 The MMMP must be produced by suitably experienced tangata whenua engaged by the consent holder. It will address proposed monitoring methods, sites and frequency. It must be submitted to the Council (Manager Compliance) within 30 months of the resource consent commencing.

- 72 The consent holder must engage suitably experienced tangata whenua to prepare a MEP. This plan will set out the methods, projects or operational improvements the consent holder will undertake to enhance the mauri of the rivers where gravel extraction is occurring. It must be submitted to the Council within five years of the consent commencing.
- 73 Finally, the consent holder must ensure that a Spill Management Plan (SMP) is prepared for each gravel extraction site to ensure any worksite spills are avoided and otherwise managed appropriately. Each SMP must be provided to the Council prior to the commencement of any works at each gravel extraction site.

Ongoing monitoring

- 74 The conditions set prepared for the hearing required that monitoring work be done but did not contain a clear process for incorporating information from ongoing monitoring without going through a review process under s128 of the Resource Management Act 1991. It was suggested by the Hearing Panel that the conditions set incorporate an adaptive management approach.
- 75 With the assistance of Dr Robin Holmes, the consent holder has prepared a Freshwater Ecological Monitoring and Evaluation Plan (**FEMEP**) which will be included as Appendix B of the resource consent conditions.
- 76 The proposed FEMEP was circulated to the parties on 18 March in accordance with Hearing Panel Direction Number 2. It has been reviewed by Dr Andy Hicks for the Consent Authority and is able to be finalised, however with staff being away due to COVID a final version has yet to be issued. The Applicant expects to be able to supply the Panel with the final FEMEP by 3 June 2022 and requests leave from the Hearing Panel to provide the Panel with a copy of the FEMEP on that date.
- 77 The FEMEP requires a three year monitoring programme, which is the minimum period recommended by Dr Holmes to provide sufficient

data. On a completion of that programme, an independent appropriately experienced and qualified freshwater ecologist and fluvial geomorphologist will prepare a review report which will be submitted to the Council (Manager Compliance). If the monitoring identifies adverse ecological effects arising from the gravel extraction activities authorised under the consent, the review report must recommend mitigation options and enhancement initiatives which can be incorporated into updates of the relevant EMEP²⁸ and OMP.

CONCLUSION

- 78 The applicant seeks consent to extract gravel from the bed and berms of the Ngaruroro, Tutaekuri, and Tukituki Catchment Rivers to maintain the channel capacity of its flood protection schemes and reduce flooding and erosion risks.
- 79 Climate change will likely increase the frequency and severity of floods.
- 80 The planners for the parties have worked hard, and after no less than five witness caucusing meetings have settled on conditions sets for each of the three resource consents which are largely agreed.
- 81 The main sticking points are conditions proposed by the submitters requiring a Memorandum of Understanding or Partnership to be prepared, CIAs or CARs to be prepared for each consent, the term of the consents and a late request from the submitters to establish four Tangata Whenua Groups, rather than two.
- 82 When the Hearing Panel is making a decision on each of those issues, it is important that it bears in mind the objective of this consenting process – which is that existing flood control schemes are maintained through the removal of gravel where required, and any effects are managed in the best

²⁸ As discussed at the hearing, the Applicant has already developed and implemented Ecological Management and Enhancement Plans for the Tukituki Catchment, Ngaruroro and Tutaekuri Rivers.

possible way taking into account the likely burden on the consent holder and ultimately ratepayers. A degree of pragmatism is required.

83 For the reasons set out in this Reply, in my respectful submission, this Panel should grant the consents for a term of 20 years, subject to:

83.1 The proposed conditions agreed by the planners;

83.2 Without conditions 13 and 56-59;

83.3 The wording proposed by Mr Bendall for condition 22(b);

83.4 Conditions requiring the establishment of two Tangata Whenua Groups across all three consents. The membership of those Groups is set out in the conditions provided at paragraph 32 of this Reply.

27 May 2022



Lara Blomfield
Counsel for the Applicant



16 December 2021

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Attention: Deborah Kissick

Dear Deborah,

Re: Gravel Extraction - HB Regional Council - RM200022

The Customer and Consents Manager under delegated authority from the Central Hawke's Bay District Council on 16 December 2021 approved the application as follows:

It is recommended that pursuant to Sections 104, 104C, and 108 of the Resource Management Act 1991, the Central Hawke's Bay District Council grants land use consent to undertake beach raking and the extraction of gravel (defined as gravel and associated sand, silt and other riverbed sediments) from the river beds Tukituki River, Waipawa River, Makaretu River, Mangaonuku Stream, Tukipo River, comprising the active river channel and berms (Tukituki Catchment Rivers).

REASONS FOR RECOMMENDATION

- (1) The adverse effects of the activity on the environment will be no more than minor.
- (2) Public Notification is precluded.
- (3) The adverse effects on any person are less than minor and there are no circumstances which warrant limited notification.
- (4) The activity is consistent with the provisions of the Operative District Plan and the Proposed District Plan.

CONDITIONS:

General

1. Except as otherwise specifically provided for by other conditions of this consent, the global gravel extraction and raking activities shall proceed in general accordance with the application submitted to the Central Hawke's Bay District Council on 22 February 2020.

Document	Prepared By	Date
Hawke's Bay Regional Council - Gravel Extraction: Tukituki Catchment Rivers	Traverse Environmental Ltd	10 February 2020
Areas of Significant Nature Conservation Value	Hawke's Bay Regional Council	14 December 2021

2. This consent shall allow for the extraction of gravel and raking activities from the active river channel to the berm and bank areas in Areas of Significant Nature Conservation value as identified in Schedule D of the Central Hawke's Bay Operative District Plan in the following rivers and streams:

- Tukituki River: from the northernmost extent of the Central Hawkes Bay District upstream to map reference NZTM 1875983 east, 5581489 north, at the end of the Tukituki Road (unformed legal road) to the west
- Waipawa River: from the confluence with the Tukituki River upstream to map reference NZTM 1871062 east, 5584833, north to the confluence with the Makaroro River (opposite the Wakarara Road, Makaroro Road intersection)
- Makaroro River: from the confluence with the Waipawa River to the boundary with the Ruahine Park Conservation Area at the end of Makaroro Road (unformed legal road) to the west
- Mangaonuku Stream: from the confluence with the Waipawa River to the confluence of the Mangamate Stream at map reference NZTM 1899100 east, 5588312 north, opposite the Creek Road Ford
- Tukipo River: from the confluence with the Tukituki River to the confluence with the unnamed streams opposite SH50 at map reference NZTM 1884775 east, 5570745 north
- Makaretu Stream: from the confluence with the Tukipo River to opposite the Rakautatahi Urupa, State Highway 2 NZTM 1883583 east, 5565223 north

Note:

- *Gravel extraction includes associated sand, silt and other riverbed sediments extracted from the river.*
- *The plan prepared by Hawke's Bay Regional Council, titled "Areas of Significant Nature Conservation Value", approved in Condition 1 above, should be referred to.*

Monitoring and Compliance

3. Pursuant to section 36 of the Resource Management Act 1991 the Consent Holder and their contactors shall pay the actual and reasonable costs incurred by the Central Hawke's Bay District Council when monitoring the conditions of this consent.
4. The consent holder shall ensure that any contractors engaged to undertake gravel extraction and raking activities authorised by this consent abide by the conditions of this consent. The person responsible for the work onsite shall be made familiar with the consent conditions and a copy of the consent conditions shall be included with any authorisation issued to contractors by the consent holder.

Stockpiling

5. Gravel stockpiling in an Area of Significant Nature Conservation Value shall only occur temporarily, while extraction is occurring.

Accidental Discovery Protocol

6. In the event of any archaeological site or wāhi tapu being uncovered during the exercise of this consent, activities in the vicinity of the discovery shall cease. The consent holder shall contact the Customer and Consents Manager at the Central Hawke's Bay District Council to obtain contact details of the relevant tangata whenua. The consent holder shall then consult with the relevant local hapū or marae and the Heritage New Zealand Pouhere Taonga and shall not recommence works in the area of the discovery until the relevant Heritage New Zealand Pouhere Taonga and tangata whenua approvals to damage, destroy or modify such sites have been obtained.

Access and Traffic Management

7. Where damage has been caused to the road construction as a result of heavy vehicle accessing and egressing from the gravel extraction site and stockpile areas, the Consent Holder shall be responsible for ensuring the

any repairs to the road are completed at the contractor's expense and to the satisfaction of the Land Transport Department at the Central Hawke's Bay District Council.

Onsite management

8. Dust and sediment control methods shall be used in accordance with the Hawke's Bay Waterway Guidelines Erosion and Sediment Control (Dated April 2009) to mitigate potential discharge effects where sediment might enter the active river channel or dust may discharge beyond the boundaries of the river and its banks.
9. The exercise of this consent, including machinery crossing the active river channel and in the vicinity of riverbed bird nesting sites, shall be managed in accordance with the Tukituki Catchment Rivers Ecological Management and Enhancement Plan May 2017 (HBRC Plan 4925), and any subsequent revisions of that Plan that are approved by the Council in a technical authorisation capacity.

Note: Reference should be made in particular to Section 3.3, "Ecological Management Objectives, Methods, and Monitoring", of the Ecological Management and Enhancement Plan.

10. The consent holder shall ensure that the site is restored on completion of the gravel extraction operation as follows:
 - a) Consent holder shall remove all plant, machinery, equipment, signs and other structures associated with the operation from the riverbed immediately on completion of operations
 - b) No reject, surplus or unused gravel from a gravel processing plant is to be deposited into or onto the actively flowing channel
 - d) All disturbed areas shall be reinstated as far as is practical to minimise the release of sediment to flowing waters, in accordance with "Environmental Code of Practice For River Control and Waterway Works (February 2017, HBRC Report No. 3256 – AM 04/15)"

Complaints Register

11. The Consent Holder shall ensure that the raking and gravel extraction operators maintain a complaint registers, which shall be made available to the Consent Authority on request and at completion of the works, shall be submitted to the Customer and Consents Manger at the Central Hawke's Bay District Council for their records.

Any complaints pertaining to the operation of the gravel processing shall be recorded by the Consent Holder and shall include:

- a) The date, time and nature of the complaint
 - b) Name, phone number and address of the complainant unless the complainant wishes to remain anonymous
 - c) Action taken by the consent holder to remedy the problem
 - d) The weather conditions at the time, including wind direction, wind strength and temperature, and
 - e) Date and name of the person making the entry
12. Details of any complaint shall be provided to the Consent Holder and Customer and Consents Manager at the Central Hawke's Bay District Council within 24 hours of the complaint/s being made or the next working day.

Review of Conditions

13. Pursuant to section 128 to 131 of the Resource Management Act 1991, the Central Hawke's Bay District Council may serve notice on the Consent Holder of its intention to review the conditions of this consent, for the purpose of imposing additional, or modify existing conditions of consent relating, but not necessarily limited, to the matters specified hereunder if the Consent Authority considers it necessary to deal with any adverse effect on the environment which may arise from the exercise of this consent and which is appropriate to deal with at a later date.

Note: A review of conditions may be required for the following reasons:

- *In relation to Condition 4, in the event stockpiling is undertaken for longer than the gravel extraction activity*
- *Following review of the Complaints Register required by Condition 10 above.*

ADVICE NOTES:

(1) Lapse of Consent

Under section 125 of the RMA, this consent lapses ten years after the date it is granted unless an application under section 125 of the RMA is made to the Council before the consent lapses (five years) to extend the period after which the consent lapses and the Council grants an extension.

(2) Archaeological Material

If the owners of the property, or their contractor, discover any archaeological material (including human remains) during any works they are advised to cease work and contact Heritage New Zealand immediately.

(3) Earthworks

In regard to earthworks required to form any of the proposed works, it is noted that compliance with the standards of the Regional Resource Management Plan Rule 7 'Vegetation Clearance and Soil Disturbance' is required.

(4) Objections

Any objection to Council's decision on such application must be made in writing in accordance with Section 357 of the Resource Management Act 1991 within 15 working days of notification of this decision and be accompanied by the required Council fee.

(5) Other Consents

The consent holder is responsible for obtaining all other necessary consents, permits, and licences, including those under the Building Act 2004, and the Heritage New Zealand Pouhere Taonga Act 2014. This consent does not remove the need to comply with all other applicable Acts (including the Property Law Act 2007 and the Health and Safety at Work Act 2015) relevant Bylaws, and rules of law. This consent does not constitute building consent approval. Please check whether a building consent is required under the Building Act 2004. It is noted that resource consents from the Hawke's Bay Regional Council (as consenting authority) are required for the proposal and are the responsibility of the consent holder to obtain.

Should you have any queries with regard to this consent please do not hesitate to contact me.

Yours sincerely,



Robyn Burns
Customer and Consents Manager