

BEFORE THE HAWKE'S BAY REGIONAL COUNCIL

UNDER The Resource Management Act 1991
(RMA)

IN THE MATTER of an application by **RAVENSDOWN LIMITED** (Ravensdown) for new and replacement water and discharge permits for the operation of the Napier Works and the establishment of a habitat enhancement project.

**SUBMISSIONS OF COUNSEL FOR RAVENSDOWN REGARDING
CONSENT DURATION**

29 NOVEMBER 2022

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MAY IT PLEASE THE COMMISSIONERS

Introduction

- 1 These submissions are for the purpose of assisting the Commissioners determine the appropriate duration of the primary consents for the Ravensdown Napier Works¹, should you be minded to grant consents.
- 2 I begin with some general observations, and then discuss some specific factors which I submit can usefully be referred to in guiding a decision on consent duration. I conclude that in the circumstances of this application a duration of 35 years for the primary discharge and water permits is appropriate.

General Matters

- 3 Maximum consent duration for water and discharge permits is limited by statute to 35 years from the date of grant². While consents can be and often are granted for shorter periods than the maximum 35 years, there is no general presumption or rule that says the granting of the maximum term is inappropriate. There are many examples where the maximum 35 year permissible duration of consents has been held to be appropriate in the circumstances³.
- 4 The duration of resource consents is to be governed by reference to the sustainable management purpose of the Resource Management Act, and an applicant is entitled to as much security of term as is consistent with that purpose⁴.
- 5 There are good reasons for ensuring the duration of resource consents is not unnecessarily constrained. Firstly, consent holders have significant investments in plant and infrastructure, including in the ongoing development and use of technology and methods to carefully manage and reduce adverse effects on the environment. It is reasonable that consent holders have a sufficiently long duration of consent such that they are confident in making ongoing investment decisions in ensuring good environmental performance. That is particularly the case where a commitment is being made to make further substantial investments in plant over the life of a consent.

¹ The land, air and water discharge permits, and the water take permit associated with the operation of the plant and water treatment system

² Section 123(d) RMA

³ A recent 'local' example is the treated wastewater discharge and seabed occupation consents for Pan Pac's pulp and paper mill at Whirinaki – see *Pan Pac Forest Products Ltd v HBRC* [2019] NZEnvC 114. Other examples within Mr Daysh's planning experience are provided in his evidence at paragraph 8.5

⁴ *Bright Wood NZ Ltd v Southland RC* EnvC C143/99

- 6 Secondly, the process of applying for replacement consents is onerous and expensive – not just for applicants, but also for other stakeholders including neighbours, Mana Whenua, parties with statutory responsibilities such as Te Whatu Ora – Health New Zealand, and other interested parties. It does not promote the efficient use of time and resources to require continuing operations to apply for replacement consents more frequently than is necessary.
- 7 Some assistance around expected consent duration is also available in the relevant regional plans⁵ which contain a guideline indicating that consents will generally be granted for between 20 – 35 years. From that guidance I conclude that the plans contemplate that in suitable cases the maximum 35 year term is contemplated and available.
- 8 The oft-quoted case *PVL Proteins Ltd v Auckland RC*⁶ provides a catalogue of factors that can be relevant to the duration of a consent, though perhaps the most important point to make that arises from that case is a general one. Consent duration cannot be considered in isolation. Rather, it must be considered within the context of an entire activity and its effects, the relevant provisions in the planning documents, the nature of the receiving environment, and in the context of the various conditions and constraints within which an activity must lawfully operate. I submit it follows that there is no place for a position by a party that effectively says “regardless of the effects of an activity (or the lack thereof) and how a consent holder proposes to manage those effects over time, we do not support a consent duration of more than x years”
- 9 The duration of a consent cannot be divorced from the other factors forming the overall context of an activity and is correctly seen as part of a ‘consent package’. Quite properly, where other parts of the package are weak – where there is no commitment to implementing good technology, no adoption of contemporary quality standards for discharges to the environment, or no attempt to recognise the cultural effects associated with an activity – then a shorter consent may be indicated so as to ensure the promotion of sustainable management. Conversely, where other parts of the package are strong – where there is a commitment to ongoing improvement, genuine engagement to address Mana Whenua concerns, and adoption of contemporary quality standards for discharges – a longer term is appropriate to reflect the strength of the overall package, and to recognise the cost that comes with such commitments.

Factors relevant to this application

⁵ Hawke’s Bay Regional Resource Management Plan (8.2.4) and Regional Coastal Environment Plan (29.2.3)

⁶ EnvC A61/2001 at [27] – [34]

- 10 **Scale of adverse effects.** The expert assessments accompanying the application conclude that there are no significant adverse effects arising from the current discharges to the receiving air and aquatic environments. That is not to say that there is no room for improvement, but this is not a case where there is an existing ‘problem’ that needs something significant to change before the activities could be considered appropriate.
- 11 **Adoption of best discharge options.** An important aspect of the application that supports a longer consent duration is the commitment in the short term to move to a discharge of treated storm and process water to land rather than to the estuarine environment, whenever soil conditions allow. This will have the effect of significantly reducing the amount of sediment and other contaminants entering the aquatic environment. While it may be that in the short term improvements in the receiving aquatic environment will not be discernible because of the confounding influence of other discharges into that environment, the change in the priority receiving environment from water to land is a significant development, and one that accords with the preferences of Mana Whenua and those of the wider community as expressed through the planning documents. This can be contrasted with an approach that fails to consider alternatives that could result in the avoidance or reduction of adverse effects on Māori values⁷.
- 12 **Adoption of progressive quality standards.** The applicant’s approach is to anticipate that the TANK Plan water quality standards will in due course become the standards that all relevant discharges to the TANK waterbodies will need to meet over time. The applicant’s approach is to commit now to meeting those standards in the receiving environment within six years – well ahead of the timeframe that might be expected to apply generally. This is the opposite of a case where the granting of a longer consent term would have the effect of frustrating the implementation of a new regional plan⁸.
- 13 **Technology review and continuous improvement.** The applicant has proffered a strong review regime requiring it to undertake regular reviews to inform whether it continues to apply the best practicable options to its operation as part of a commitment to continuous improvement.
- 14 **Monitoring, reporting and formal review.** A comprehensive monitoring regime is proffered to ensure that effects of the applicant’s consented activities are able to be identified and measured. Results are required to be reported to the Council and can

⁷ *Te Maru o Ngati Rangiwewehi v BOPRC* (2008) 14 ELRNZ 331

⁸ *RFBPS v Waikato RC* [2009] NZRMA 439

form the basis of formal condition reviews, and enforcement action should there be breaches of consent conditions for any reason. Mr Daysh discusses the issues raised by Te Whatu Ora in relation to review at section 7 of his evidence, and is satisfied that the conditions proposed and accepted by the Council team are appropriate. I agree with that. Ravensdown is committing to 10 yearly BPO technology reviews and the review conditions expressly note implementation of the BPO as one of the grounds for Council review. There is no gap that needs to be filled by further conditions or commitments from the applicant.

- 15 **Assured performance.** The technical advice the applicant has received and included with the application confirms there is no reason to think that the proposed actions to better control contaminant sources and better treat discharges will fail to achieve their intended result. This is not a case where there is concern the applicant's proposed upgrades will fail to deliver the expected outcomes⁹.
- 16 **Previous consent duration does not set a precedent.** The air discharge permit being replaced as part of the current application was for a 15 year term. That does not set a precedent or give an indication that on this occasion a consent duration significantly less than the 35 years allowed for in the RMA is appropriate. The previous consent was granted in a different context where the discharges to air from the operations at the site were not as controlled as they are now, and where there were significant concerns about actual or potential effects of discharges to air being expressed by sectors of the community, including horticulturists. It is significant to note that in relation to the current publicly notified application there have been no submissions from horticultural interests in the area. I submit that for the purposes of assessing the appropriate consent duration the present application is entitled to be treated on its merits rather than being seen in light of the previous consent duration.
- 17 **Agreement with Mana Whenua.** A significant and encouraging aspect of the proposal is the fact that through meaningful engagement over an extended period there has been an important agreement forged with Mana Whenua submitters in relation to the development, management and monitoring of the Habitat Abundance Restoration Project (HARP). The HARP represents an important opportunity to not only provide physical restoration of an area that has been degraded by different activities over time, but an opportunity for the applicant to work with Mana Whenua on a project that will help restore mana, improve hauora, enable Mana Whenua to fulfil their kaitiaki responsibilities in a meaningful way, allow for mahinga kai practices to be exercised,

⁹ *Manawatu DC v Manawatu DC* [2016] NZEnvC 53

and assist the applicant in its journey towards a greater understanding and incorporation of Te Ao Māori in its activities.

- 18 Through the actions being committed to over the term of the consent Te Mana o te Wai will be respected and advanced.
- 19 Mr Torrens, the Napier Works Manager, and Mr Daysh, a highly experienced and senior planning consultant each discuss the way the application has developed through engagement with Mana Whenua. I submit their evidence shows that the process that has been followed and the outcomes achieved – both the details of the commitments embodied in the consents, but also the forging of relationships between Mana Whenua and Ravensdown that stand above and outside the resource consent realm – demonstrate that Ravensdown’s approach is highly commendable.
- 20 I would particularly draw to the Commissioners’ attention to the Building Better Homes, Towns and Cities National Science Challenge case study prepared by Aramanu Ropiha as referenced in paragraph 4.6 of Mr Torrens’ evidence and included as Attachment 1. This case study discusses the process and outcomes from the perspective of a Mana Whenua participant.
- 21 I would also draw to the Commissioners’ attention the letter from Ngāti Pārau Hapū Trust dated 28 October 2022¹⁰ in which the Trust indicates it is comfortable with the granting of 35 year consents on the basis of the conditions that have been agreed. Ngāti Pārau Hapū Trust is one of the entities that must be consulted regarding the appointment of representatives to the Awapuni Reference Committee. The appointees are to be representatives of the relevant mana whenua hapū (Ngāti Pārau, Ngāti Hori, Ngāti Hinemoa and Ngāti Hawea).¹¹
- 22 This position can be contrasted with the position set out in the evidence of Mr Smith on behalf of the submitter Ngāti Kahungunu Iwi Incorporated (NKII). It is my understanding that NKII alongside Heretaunga Tamatea Settlement Trust and Mana Ahuriri Trust are overarching Iwi entities and staff from these organisations are sometimes asked to provide technical advice to support mana whenua hapū on resource management issues affecting their rohe.
- 23 Mr Smith’s evidence focuses on perceived problems or deficiencies in the earlier engagement process¹² that were subsequently addressed, and then appears to draw

¹⁰ Attachment 2 to Mr Torrens’ evidence

¹¹ General condition 27

¹² These issues were also traversed at the first pre-hearing meeting and the Commissioners will recall that there is another side to that story

the conclusion that these process considerations justify a shorter term consent of 20 years. I submit the logic is not compelling.

- 24 I note that Mr Smith's position is difficult to reconcile with the position explained by Mr Daysh at paragraph 6.4 of his evidence where he sets out the position that was reached at the final meeting with Mana Whenua representatives on 6 October 2022. Mr Smith's evidence does not address Mr Daysh's comments.
- 25 A 20 year term is at the bottom end of the range for consent term as per the policies in the planning documents, as discussed in paragraph 7 above.
- 26 I submit there is no compelling evidence before the Commissioners that would support this outcome, and indeed the weight of evidence supports a 35 year term.

Consent Condition Linkage

- 27 On review of the proposed condition wording Ravensdown suggests one small amendment to create a better linkage between the various conditions addressing dust deposition monitoring along the Waitangi Waterway. The suggested change does not alter the intent of the conditions and simply creates a clear linkage between the dust deposition monitoring required under the Air Discharge Management and Monitoring Plan (in the air discharge consent) and the Waitangi Waterway monitoring requirements contained in the Appendix 1 General Conditions relating to both Land and Water Discharge Permits.
- 28 The suggested change is to General Condition 24 as follows:

24 Following this two-year period the consent holder shall commission a report by a suitably qualified expert to assess the trends shown by this monitoring and the effectiveness of the SCMP actions. If the results from the two-year period of water quality and dust deposition monitoring (as required by condition 56(i)(vii) of the air discharge consent) show that dust originating from the Ravensdown site is not reaching the Waitangi Waterway then the sampling can be discontinued. If dust is still entering the Waitangi Waterway from the Ravensdown site after this two year period of monitoring then the SCMP shall be reviewed and updated to target identified dust sources for remediation and the Waitangi Waterway water quality and dust monitoring (as required by condition 44 56(i)(vii) of the air discharge consent) shall continue until such time that the effects of dust from the Ravensdown site are not measured in the Waitangi Waterway. This process of reporting and SCMP review shall be repeated following five years of the commencement of this consent (five years being the timeframe set in the SCMP for the completion of all source control measures identified).

Conclusion

- 29 Both the RMA and the relevant regional plans anticipate there will be occasions where the granting of a consent for 35 years will be appropriate.
- 30 This application is for consents to enable an existing, well performing and regionally important physical resource – the Napier Works – to continue to manufacture superphosphate, an important contributor to New Zealand’s agricultural output. In so doing the Napier Works makes an important direct economic and employment contribution to the regional economy.
- 31 In organising its affairs for the future, the applicant has adopted an approach that will require it to move away from a direct discharge to water in favour of a discharge to land as the preferred receiving environment for the discharge of treated storm and process water. It has adopted the emerging TANK plan water quality standards as compliance limits to be achieved in the short term. It has achieved an important agreement with Mana Whenua submitters on the development of the HARP which will yield a range of positive outcomes for people and the environment. It is committed to continuous improvement and BPO technology reviews, as well as comprehensive monitoring and reporting of the effects of its activities in the receiving environment.
- 32 It is difficult to imagine what more the applicant could do to demonstrate its commitment to sustainable operations and a genuine interest in being a leader in improving the quality of the local environment with which its activities inevitably interact.
- 33 The applicant has benefitted enormously from the willingness of Mana Whenua to walk alongside it, to guide it to help restore some of what has been lost and diminished in the estuarine environment over many years. The opportunities the applicant has to build on the relationship that has begun with Mana Whenua is perhaps the thing that is most worthy of celebration as a result of this process.
- 34 In all the circumstances I submit this is an occasion where the granting of consents for 35 years is appropriate.



Stephen Christensen

Counsel for Ravensdown Limited

29 November 2022