Before a Decision-Making Committee
Of the Environmental Protection Authority

EEZ100015

Under	the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012
In the matter of	an application for a marine dumping consent to dump dredged material at a deep-sea site east of Great Barrier Island
By	**Coastal Resources Ltd** Applicant

CLOSING LEGAL SUBMISSIONS ON BEHALF OF COASTAL RESOURCES LTD

21 December 2018

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INTRODUCTION

1. These closing submissions on behalf of Coastal Resources Limited (**CRL**) can be relatively brief. The hearing process, and in particular the efforts made between all of the expert witnesses, have greatly reduced the matters in contention.

2. There are three documents being filed with these submissions: a joint witness statement from the ecology experts, a joint witness statement from the planning experts, and a set of refined conditions to which each of those statements refers.

3. One explanation is required in relation to the joint statements. My instructions are that the joint statement of ecologists reflects what was agreed between them, though it has not been signed yet by Mr Duffy, and he is now on leave until sometime in the New Year. My understanding also is that the amendment proposed in schedule 6C is one put forward by Mr Duffy. CRL does not support that condition, and I address it below,[1] but reserve the right to provide any additional response that becomes necessary once Mr Duffy's position is formalised. In all other respects the refinements in the amended set of conditions are either self-explanatory or are the subject of additional comment in the relevant joint statement.

4. CRL maintains and relies on all of the submissions made in opening, and here will focus purely on the few matters that warrant any response in light of the hearing and in light of the further agreements between experts. These matters are:

   (a) The term of consent,

   (b) The volume of dumping,

   (c) Conditions to directly manage and monitor the sediment plume,

   (d) Other refinements to the conditions, and

   (e) Iwi interests.

[1] Addressed below at [22]-[23].

Consent Term

5. CRL has sought a consent term of 35 years. This is opposed by the Director-General of Conservation, who proposes a 20-year term.

6. With respect, the Director-General's position is entirely arbitrary. No evidential basis is provided to justify a 20-year term over any alternative. The only evidence comes from Mr Riddell, in whose view a 35-year term is not appropriate for any marine dumping consent in this environment. Aside from the fact that this cuts across Parliament's intentions as expressed through the legislation (i.e. that a term of up to 35 years may be appropriate for a marine dumping consent), no reasoned basis is given for the proposed 20-year alternative.

7. Such arbitrariness is problematic. The appropriate basis for this DMC's decision-making is to evaluate the application against the principles and guidance that the Act provides, but the Director-General advances no justification for a 20-year term under any of those principles or guidance. On such an un-principled approach there is no meaningful basis for the DMC to say that 20 years is any more approriate than 15 years, 25 years, or any other random term less than 35 years.

8. By comparison, CRL maintains the simple, but evidentially supported proposition, that the need for marine dredging in the Auckland region is going to continue indefinitely. On that basis, CRL submits that there is no basis to impose any term *other* than 35 years.

9. It may be that the Director-General's concern stems from our relative lack of knowledge about New Zealand's deepwater environments, or the inherent adverse effects of marine dumping activity, which may make it seem desirable to ensure CRL's proposal is re-examined sooner than in 35 years' time. But concerns of that sort are already addressed in other ways.

10. First, from a technical perspective, there are a broad range of triggers for reviewing the consent under the EEZ Act,[2] which have now been supplemented by proposed conditions of consent.[3] Review is not a low-key

[2] Section 76(1).
[3] Proposed condition 25.

response. It can be broad enough to lead to a consent being cancelled in appropriate circumstances.[4]

11. Second, from a practical perspective, a review of the situation is liable to be triggered long before 35 years have passed. Mr Akehurst's evidence is that by 2022 there will be demand for dumping of 250,000m^3 of marine dredgings per annum. Mr Akehurst fairly acknowledges that the demand will be "lumpy", and that there may be some inaccuracy in these projections. However, this simply means the take-up of the full volume of dumping will occur slightly later.[5] On the combined evidence of the economists, it seems reasonably conservative to conclude that CRL will be making use of the full volume within 10 – 15 years if the consent is granted. Accordingly, the DMC can assume that there may be practical reasons why the merits of the dumping activity might come up for review far sooner than in 35 years' time.

12. For all these reasons, CRL maintains that 35 years it not only an appropriate term, it is the only term that has been properly supported by reasoned analysis and evidence.

Volume

13. CRL has sought approval to dump up to 250,000m^3 per annum. This is opposed by the Director-General of Conservation, seemingly on the basis that

    (a) it may be more than CRL needs;

    (b) it may remove incentives for anyone to look for other alternatives.[6]

14. The first of these has been addressed above in relation to the term of consent: CRL maintains that the evidence adequately demonstrates the need for the volume sought within the near future.

15. The Director-General's second concern is not a matter that the EEZ Act requires the DMC to consider. The DMC is required to assess the application before it, and in relation to that application to take account of alternative methods of disposal, and opportunities for reuse, recycling or treating. What

[4] Section 81(3).

[5] Though Mr Murray was reluctant to offer an estimate of the time shift without further sensitivity testing, he agreed that the maximum volume would be reached.

[6] Opening submissions of Director-General of Conservation at [16].

the Director-General seeks, by comparison, is that the DMC act on a principle (not contained in the legislation) that marine dumping generally should be subject to ongoing review in an effort to find alternatives. Had Parliament intended to secure ongoing review of alternatives in that way it could easily have done so by imposing a shorter maximum duration on dumping consents — forcing consent holders to re-apply and re-assess alternatives on a more regular basis.

16. For these reasons, CRL maintains that volume of 250,000m^3 — now subject to a two-year rolling average under the proposed conditions — is appropriate for the consent.

Sediment Plume Management and Modelling

17. The Director-General of Conservation maintains that the proposal should be subject to conditions requiring a sediment standard to be met (proposed condition 5(d)) and monitoring of the sediment plume (proposed condition 8B).

18. CRL opposes those conditions, for two reasons.

19. First, Mr Andrews' evidence is that in practice it is impossible to undertake monitoring in the manner proposed by the Director-General. This is why proposed condition 8B (which is put forward by the Director-General) refers to a non-existent schedule. No detailed methodology for such a condition has been prepared by the Director-General's expert witness, Dr Longdill; and CRL cannot put forward a schedule because Mr Andrews is simply unable to create one.

20. If the Director-General seriously intended to pursue this, then its omission to provide the DMC with proposed wording requires the DMC to come up with wording of its own, unsupported by evidence, and without the proper testing of its workability. For this reason alone, CRL submits condition 8B cannot be imposed.

21. Second, these conditions would not be for the purpose of managing an adverse effect, which is a requirement of any condition under s 63 (other than a condition that might be proferred by an applicant on an *Augier* basis). CRL's proposed conditions directly address the effect of the sediment settling onto the seabed, the evidence being that beyond the NDA

boundary the quantities that may settle are so low (0.1mm per annum, at *most*) that there is no adverse effect at all. At no point has any witness, or the submissions for the Director-General, identified an adverse effect that may be caused by the plume itself. The evidence is that it will not affect fish, marine mammals or any other biota in the water column. Overall, there is simply no basis for a condition such as 5(d) to be imposed: it attempts to impose a compliance standard that is demonstrably *not* for the purpose of managing an adverse effect.

Other refinements to the proposed conditions

22. A number of other refinements have been made to the conditions that are self-explanatory or are otherwise explained in the joint witness statements. There is one proposed change that needs to be addressed here, namely the addition to Schedule 6C that would require examples of biota from the monitoring to provided to an appropriate museum.

23. That condition does not have the purpose of managing an adverse effect of CRL's proposal, and could only be imposed if it were volunteered by CRL on an *Augier* basis. CRL does not volunteer the condition, and considers it unnecessary. Accordingly, it is submitted that the condition is unable to be imposed.

Iwi Interests

24. CRL has the opportunity to comment on the further material which it understands was lodged by Nicola MacDonald on behalf of Ngati Rehua on 14 December 2018.

25. On CRL's analysis the material does not raise any new scientific matters, but provides additional information that the DMC may find useful in understanding the cultural concerns that have already been raised (both by Ngati Rehua and others).

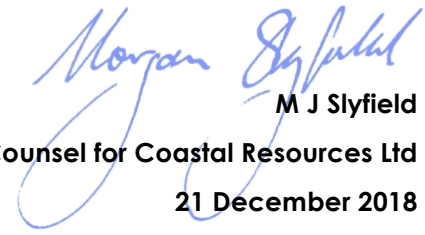
26. CRL has already addressed those matters in its opening submissions, and relies on what was said there. CRL maintains that its proposal will not physically displace any existing interest, including any excersie of a customary activity. It is inescapable that the dumping of marine dredgings will be of concern from a cultural perspective, but that is already the case with the authorised dumping of up to 50,000m^3 per annum under CRL's

deemed marine dumping consent. Overall, CRL maintains that the concerns expressed by Ngati Rehua (and other iwi submitters) do not warrant the consent being declined.

Conclusion

27. In conclusion, CRL submits that this DMC has made full use of its powers and has the best available information on which to make its decision. The information about the proposed activity is sufficiently certain and adequate that the DMC is not required to favour caution and environmental protection; but even if were required to do so, that would not preclude the granting of consent.

28. Further, CRL submits that its proposed operational limits in combination with a comprehensive set of conditions will ensure that the effects of the activity will be limited to the area of the NDA. On the evidence it has heard, the DMC can reasonably conclude that there are no options for reusing, recycling or treating the marine dredgings without imposing unreasonable costs, and the dumping of this material in the limited and controlled manner proposed is the best approach to its disposal in all the circumstances.



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