

## MEMORANDUM

### Advice regarding formulating effective consent conditions to support panel decision-making

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#### Introduction

1. The purpose of this memorandum is to set out some high-level suggestions to support the formulation of effective consent conditions.
2. They are intended to support decision-making of the Fast Track Panel related to the application by McCallum Brothers to undertake sandmining activities off the coast of Northland (Bream Bay). The proposed operations are akin to the long-running sandmining activities near Pākiri in the neighbouring Auckland region.
3. This memorandum conveys no view on the application. The purpose is to provide support to decision-making from an experienced regulatory professional.
4. The Panel may decline the application. In the event, however, the consent is granted the panel may wish to consider the guidance set out in the next section.
5. This guidance should be read together with any relevant legislative constraints within the Fast Track Approvals Act 2024 and relevant provisions of any other legislation.

#### Experience and credentials

6. I hold a Bachelor of Science, Post Graduate Diploma (Environmental Management) and a Master of Environmental Legal Studies from the University of Auckland and a PhD from the University of Waikato. My academic research at a doctoral level explored compliance rates in ecological compensation/biodiversity offset arrangements under the Resource Management Act. In the wake of that research, the Environment Court and the Resource

Management Law Association of New Zealand launched a nationwide speaking tour on the importance of conditions of consent and getting them right.

7. Other experience of relevance to the topic of setting robust consent conditions include
  - a. I have been a frontline Resource Management Act enforcement officer, undertaking all aspects of the compliance monitoring and enforcement role
  - b. I was the author of a comprehensive analysis of environmental regulators in New Zealand that included within scope councils and the Department of Conservation.<sup>1</sup>
  - c. I am a qualified Hearings Commissioner and regularly called upon to provide advice on policy, planning and compliance matters in local government.
  - d. I led the initial development of the regional council compliance metrics report, a nationwide reporting framework for regional councils to provide transparency on their resource management compliance activities
  - e. I developed the refreshed compliance regime under the repealed Natural and Built Environment Act 2023 (which is being adopted by current reform processes).
  - f. I provide regular training, professional development and review services to resource management regulators across Australasia.
  
8. I have spent my career in a mix of operational and strategic regulatory roles, coupled with research and evaluation positions throughout local and central government, the not-for-profit sector and consulting. I consider this experience and technical background means I am well placed to offer a perspective on consent conditions in the event the application is granted.

## Why conditions matter

9. Conditions in consents are specific obligations for consent holders that must endure long after the decision-making process has been adjourned. They typically relate to the detail of how the proposed activity will occur, specifically mandate mitigations and provide insights into resolution pathways should issues arise.
  
10. The interaction between regulatory agencies and regulated parties (consent holders) is strongly determined by the nature and quality of the consent conditions, including their clarity, proportionality and enforceability.
  
11. Considerable energy is poured into developing the supporting information basis for conditions. Planning processes of all kinds produce vast expert commentary, require

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<sup>1</sup> Brown M (2017) Last line of defence: compliance monitoring and enforcement of New Zealand's environmental law. Environmental Defence Society Auckland

complex scientific investigations and conduct consultation and engagement with a wide variety of stakeholders. Ensuring conditions are clear and enforceable recognises that effort and cements its influence through time.

## Some things to consider when setting conditions that support good regulatory outcomes

12. The following considerations may be of use to the panel should they be minded to grant consent and to affirm a suite of conditions. The suggestions are grouped under titles pointing to the context or topic which are not specific to the application but apply more generally to sound resource management practice.

### *Enforceability*

13. Each condition should be able to be clearly determined as having been complied with or not: ambiguity will constrain any risk management or avoidance intended. Matters worth considering include
  - a. detectability (is it possible for anyone but the proponent to see or detect non-compliance and if so, how?)
  - b. incentives (when offending occurs, what are the incentives for reporting compared with incentives to not provide the information and risk potential sanction?)
  - c. where responsibility lies – ensure designated actors are clearly identified in the consent
  - d. ensure enforcement is not fettered by the prescription of consequences in conditions that are at variance with the sanctions in the applicable legislation.
14. Reviewing proposed conditions by a professional experienced in enforcement can help to identify conditions that are likely to be difficult to determine compliance with for a range of possible reasons.

### *Clarity and specificity*

15. Conditions should be clear and readable. Definitive and in plain language.
16. Definitive language avoids ambiguous terms that provide for discretion where it should not exist. Examples include 'should', 'may', 'must consider' – none of which convey a clear picture of an obligation. To that end, if no definitive requirement is captured in a condition, it may be better as an advice note.
17. Plain language phrasing is important to ensure the meaning is not lost or ambiguous and that it can be interpreted by multiple parties for multiple reasons over many years. Examples include avoiding double negatives, limiting long multi-clause sentences, minimising jargon and ensuring accurate punctuation.

18. Consent conditions can become quickly unenforceable when they include opaque and non-specific phrases such as ‘best endeavours’, ‘as far as practicable’, ‘in general accordance’, ‘where practical’ and other similarly fuzzy imperatives. If insufficient information is available to set more definitive terms, decision makers may consider that granting the consent entails too much risk. Such elastic phrasing should be reserved for minor matters of little consequence.

### *General powers under the law*

19. Conditions cannot improperly limit the application of the law. Examples include
- Cost recovery powers are available to regulatory agencies through the relevant legislation and are not limited by the consent wording.
  - The interpretation of sections such as 128 RMA that allows for the review of consent conditions under certain legislated purposes

### *Bonds and security*

20. A range of mechanisms are available under the law to secure actions and outcomes. Such mechanisms act to shift the risk from the community and the environment to the proponent of development. An example is bonds under s108A RMA which enables a decision maker to require a bond. To best safeguard the public interest, bonds should be collected and held by the regulator, should be of sufficient substance to address the costs of the relevant conditions and be provided prior to the initiation of the activity.

### *Management plans*

21. Much detail is devolved to management plans in resource management. Management plans work best where they are certified (approved by the regulator) and act to support the effective implementation of the consent. However, they are not a substitute for sufficiently detailed and robust conditions.
22. Management plans create risk where they are required to manage important risks, and the detail and feasibility of managing that risk is not assured at the time of decision making. Decision makers should have confidence that the timing, scope and nature of the management plan will be of sufficient quality and detail to safeguard the values at risk.
23. Where considerable uncertainty exists, such plans should be prepared and approved at the time of consent being granted, rather than left to an indeterminate date in the future.

### *Transparency obligations*

24. Conditions can secure reporting obligations by proponents that provide additional transparency and discoverability of important information. Examples of these requirements include
- c. Maintenance and publishing of a complaints register
  - d. Notification obligations (including timelines) to the relevant regulators of any matters of relevance to the consented activity, including non-compliance
  - e. Publishing of regular monitoring and compliance information
  - f. Logging of incidents with notification pathways to the regulator
25. Transparency obligations are most effective where timeliness of reporting is mandated (narrow windows of notification), the information to be provided is sufficient to ensure the regulator or a third party can appraise the situation effectively and where they are articulated as a matter of public record (e.g., on a website).

#### *Compensatory actions*

26. Where a proposal entails considerable adverse effects, decision makers, submitters or project proponents commonly propose compensatory actions including
- g. Cash payments
  - h. Restoration activities
  - i. Contributions to research
27. Such initiatives can allay concerns, address impacts and provide positive engagement opportunities with local communities. However, they can also chill appropriate scrutiny of applications and subsequent activities under the consent and are often implemented only weakly or not at all. Significant care should be taken in determining appropriate compensatory actions.
28. Where such compensation bears little relevance to the reasons for consent or lies outside council's jurisdiction, it may not be appropriate to include it in the consent.