

BEFORE THE ENVIRONMENT COURT

Decision No. [2011] NZEnvC 130

IN THE MATTER of an appeal under Section 120 of the
Resource Management Act 1991 (the
Act) and in the matter of a direct
referral of resource consent under
Section 87G of the Act

AND

IN THE MATTER of Three Kings Quarry

BETWEEN ENVIROWASTE SERVICES
LIMITED
(ENV-2009-AKL-000500)
(ENV-2009-AKL-000501)

WINSTONE AGGREGATES
(ENV-2009-AKL-000497)
(ENV-2010-AKL-000009)
(ENV-2010-AKL-000176)

Appellants

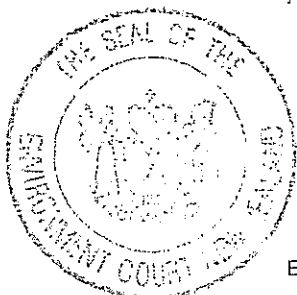
AND AUCKLAND COUNCIL
(FORMERLY AUCKLAND CITY
COUNCIL and AUCKLAND
REGIONAL COUNCIL)

Respondent

Hearing: In Auckland, 7 – 11, 14 – 17 March 2011

Court: Environment Judge J A Smith
Environment Commissioner W R Howie
Acting Environment Commissioner B Gollop

Appearances: Mr D A Kirkpatrick and Mr K R M Littlejohn for Envirowaste
Services Limited (Envirowaste)



Mr B J Matheson and Ms F N Lupis for Winstone Aggregates (a division of Fletcher Concrete & Infrastructure Limited) (**Winstones**)

Mr J A Burns and Ms M McCullough for Auckland Council (**the Council**)

Ms J L van den Bergen for Watercare Services Limited (**Watercare**) – s 274 party to direct referral

Dr R A Bellamy for the South Epsom Planning Group Incorporated (**SEPG**)

Ms W N Hoadley for Three Kings United Group Incorporated (**TKUG**)

Mrs P A Prescott and Ms E M Walker for St Lukes Environment Protection Society Incorporated (**STEPS**)

Friends of Oakley Creek (no appearance – withdrawn)

DECISION OF THE ENVIRONMENT COURT

- A. The decision of the Council is confirmed, subject to amended conditions.
- B. The resource consent with relevant conditions is to be finalised as directed within this decision for final approval by the Court.
- C. In addition, the direct referral is granted for a discretionary resource consent on the same terms and conditions as those provided for under the appeal.
- D. The two decisions can be combined, providing the substitution of the word “cleanfill” and other words for controlled fill, subject to the same terms and conditions as outlined in this decision.
- E. The applicant is to circulate the draft consent and conditions to allow the parties to submit final wording for both the grant of consent and the conditions to apply in the general form annexed hereto (B & C), modified



as directed, within 30 working days. Parties are to reply within 10 working days.

- F. If the parties cannot resolve the final wording, the applicant is to file its proposed wording within a further 10 working days, and other parties provide their proposed wording within a further 5 working days. The Court will then make the final decision on wording of conditions.
- G. Any application for costs is to be filed within 30 working days. Any response, within 10 working days, and final reply within 5 working days thereafter.

REASONS FOR DECISION

Introduction

[1] To most people, cleanfill describes a type of material used in land remediation, including bricks, ceramics, soil, rocks, gravel, sand, clay, and tiles. More problematically, it often includes concrete, although there are issues then about any wood or steel included, fibre cement, glass, asphalt and roading sub-base. Some definitions of cleanfill have also included such products as asbestos.

[2] In more recent years, concerns about contamination of soils has led to the inclusion of limits on known heavy metals. Issues continue to arise in respect of items such as hydrocarbons, organochlorines, pesticides, DDT, and the like. Envirowaste's appeal to this Court is founded on the presumption that where there is an excess in any background parameter for heavy metals, particularly arsenic, cadmium, chromium, copper, lead, mercury, nickel and zinc, then the material is no longer cleanfill. This argument has had added to it more sophisticated nuances suggesting that any more than background levels of a whole series of other substances, including hydrocarbons, pesticides, organochlorines, also mean that the material is no longer cleanfill.

[3] Many of these substances have no background levels which are published or agreed. Thus the inference that the material is not cleanfill seems largely based upon an assumption that any hazardous substance that is detectable means that the substance is no longer cleanfill. With modern analytical measures, it was accepted by all experts before this Court that examination of most materials at a molecular or



atomic level would show trace elements of most substances. Currently however, the detection limits on regular testing would not allow such a level of analysis.

[4] The applicant (Winstone) currently operates the Three Kings Quarry in Auckland, providing scoria and roading aggregate. The site will be fully worked out by 2020. With large infrastructure projects planned for the Auckland region there is demand for geographically convenient sites for the disposal of fill material. The application proposes the continuation of mining along with concurrent depositing of fill material. The proposal was granted consent by both councils, subject to conditions to control contaminants within the fill and protect the groundwater.

[5] Community and environmental groups oppose the application because of the perceived threat of contamination of the aquifer underlying the quarry site. It is agreed by all parties that the water quality currently meets NZ Drinking Water Standards. Opposition groups are concerned that potential contaminants within the fill materials will leach into the aquifer, thereby compromising its possible use as a supplement to the Auckland water supply. Further concerns include the lack of definition of the final end-use of the quarry site after filling has been completed. It is noted that a trade competitor, Envirowaste opposes the application on the grounds that the fill material being sourced does not, in its view, meet the rules of the Council Plan on what constitutes “clean fill”.

[6] Accordingly, the question raised by Envirowaste is “what constitutes cleanfill?”

[7] This Court has struggled throughout the hearing to understand the emphasis on this issue, given their direct referral of an application for discretionary consent for fill. As a consent on the basis of fill only, without any reliance on any cleanfill provisions of the relevant Regional Plan, the continuing motivation of Envirowaste (being a trade competitor of Winstone), became an issue during the course of the hearing. We shall deal with the background to this application, the proposal, and the parties before coming back to these issues.

Rehabilitation of Three Kings’ Quarry

[8] Three Kings Quarry has been operating since the 1920s and was part of a series of local quarries involved in the excavation of both scoria and aggregate



(basaltic rock). The limits of quarrying on the eastern side of the Mt Eden Road can be seen in a bluff rising to the Landscape/St Andrew's Road area with housing below. There is also signs of rehabilitation to the south of the Three Kings' Quarry site with a playing field constructed.

[9] More recently, to the immediate north of the Winstones Quarry, Hunter's Quarry area has been rehabilitated by fill and is now occupied by high-density residential homes and businesses (light industrial).

[10] Big King Reserve is a remnant scoriatic and basaltic cone rising to the west of the Three Kings site and there is a bluff on the boundary to the Hunters Quarry site below.

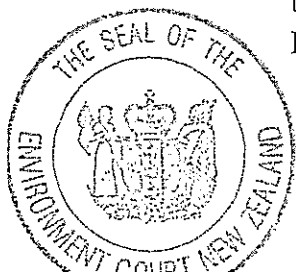
[11] The Three Kings site itself has been well-worked over a period of time and is now between 25m – 30m below the road level at its lowest point. There are still several major protrusions of basaltic rock into the quarry (which are yet to be worked out), and the scoriatic floor of the quarry still seems to be yielding material.

[12] Nevertheless, the mining in latter years has only been possible due to the dewatering of the site. Dewatering removes some 2,200m³ water per day by pumping from the quarry site to a Watercare owned facility. Currently, the facility does not treat the water, which is of very high quality, and it is simply pumped to waste flowing by stormwater to Onehunga and exiting into the Manukau Harbour.

The underlying aquifer

[13] The Three Kings quarry site itself is the centre of an aquifer described by some experts as a bucket which fills with water not only from the site but the surrounding area of some 640ha (around 9,000 homes). When the aquifer is full, it overflows through a tuff lip to the northeast (in the area of Dukes Road) flowing into the **Western Springs Aquifer**. Without the dewatering pumping, the Three Kings Quarry site and surrounding area would constitute the southeastern limit of the Western Springs aquifer. Currently the pumping disconnects it from that aquifer and we shall refer to it in this state as the **Three Kings Aquifer**.

[14] There is another aquifer immediately to the east of Three Kings Quarry and Mt Eden Road known as the **Onehunga Aquifer**. This includes an area around One Tree



Hill and flows to the south exiting at Manukau Harbour near Onehunga. Several witnesses suggested that there was some connection to the Three Kings Quarry Aquifer. However, we prefer the evidence that suggests that any such connection is likely to be marginal and that almost all of any natural flow would be through the Western Springs Aquifer.

[15] Although the Three Kings volcanic cones are surrounded by a tuff ring, there nevertheless seems to be a high degree of permeability through the volcanic ash soils, particularly with the scoria grades associated with Three Kings Quarry and the volcanoes themselves.

[16] This Mt Eden area has been well established as residential over at least the past 100 years, with some 9,000 homes on it. We understand that the great majority of homes are utilising direct ground stormwater disposal. We also understand that the local road stormwater system is partially reticulated and partially disposal to ground. We therefore acknowledge that there will be significant amount of point discharge from roof and road water to ground. This water will include metals, including particularly zinc which has a solubility according to experts of 0.5.

[17] If transmissibility of metals in water was an issue here, we would have expected to have seen elevated levels of zinc in the groundwater. Yet it is clear to us from the evidence that has been produced that the water quality at Three Kings Aquifer is extremely high and that the filtering and adsorption by the sub-soils achieves a very high level of attenuation of all materials including metals. An overview of groundwaters prepared in a 2006 report noted:¹

4.2.2. Water quality and source security

It is the basalt volcanics which exhibit some of the highest groundwater quality of the region. However, the shallow depth of the groundwater and the utilisation to receive stormwater makes them particularly susceptible to contamination. In addition, the high transmissivities of the aquifers mean that total residence times are generally low (generally less than two years) and travel times from potential pollution sources to groundwater abstractions can be much shorter than the total residence time. However, despite these potential issues, the water quality in the basalt aquifers (except in a small number of isolated areas) meets the New Zealand Drinking Water Standards (NZDWS)

¹ Pattle Delamore Partners Limited, *Auckland Three Waters Strategic Plan – Groundwater Resources Overview*, at page 22



[18] In the AEE the applicant produces a table of trace elements in Three Kings groundwater (g/m³):²

Table 3: Summary statistics for trace elements in Three Kings groundwater (g/m³)

Trace Element	Minimum	Mean	Maximum	MAVs
Arsenic	0.005	0.0011	0.0016	0.01
Boron	0.02	0.04	0.054	1.4
Cadmium	<0.00005	0.00005	0.00005	0.003
Chromium	0.00046	0.00054	0.00066	0.05
Copper	0.0008	0.002	0.007	1.0
Mercury	<0.00005	0.00006	0.0003	0.002
Lead	<0.00005	0.0006	0.0045	0.02

MAV = maximum allowable value

[19] The current quarry site is well managed and there was no indication from any the witnesses of known hydrocarbon or other spills, nor was there any suggestion that the water quality in the Three Kings Aquifer has changed from the range of figures given to us in Table 3.

[20] We did note during our site visit that there was an area on an intermediate level of the quarry (the southern end) which contained obvious signs of organic decomposition with leachate ponds and areas where leachate had drained through the sub-soils. It transpired that this was a storage area belonging to the Auckland Council and had been utilised for many years for storage by the Parks and Recreation team. It included a large amount of bark from which tannin staining of a leachate pond was seen. It also included large areas where material had been left to decompose and other areas of unattended materials, including rotting wood etc.

[21] Given that this was close to the dewatering pump house and situated on the scoria, we have real concerns about the utilisation by the Council of this site for such activities. Of all the various sources for contaminants that we have viewed or heard about during this hearing, the most significant appears to be this site. The Council have undertaken to review the matter urgently with a view to ensuring that there is no



groundwater contamination. Again, the lack of existing impact on ground water would demonstrate the filtering and adsorption qualities of the sub-grade.

[22] The abstraction point some 39m below the current bottom floor of the scoria pit is at -5 RL. Winstones hold a consent to continue abstraction from dewatering until 2030 and advise that they intend to continue utilising it and incorporate a condition within the proposed resource consent to that effect.

Activities in the area

[23] Mt Eden Road is a busy arterial road joining with Mt Albert Road just to the south of Three Kings Quarry site. On that corner there is a shopping development and some other Council facilities. The edge of the shopping development has a fence which overlooks the edge of the quarry, and the Hunters Quarry redevelopment can be seen to the north of the quarry. There are also several Council parks adjacent to the shopping development, and the eastern side of Mt Eden Road has both a primary school and a special needs school, Carlson School.

[24] To the west of the quarry is the Big King Reserve which also has a walkway through to a small sports ground which appears to be the floor of an earlier worked area. Big King Reserve itself contains the majority of the volcanic cone, although there are bluffs both over the Three Kings Quarry and Hunters Quarry area where scoria mining continued right up to the boundary.

[25] To the north of the Three Kings Quarry site and along the western side of Mt Eden Road are a number of businesses including furniture, retail businesses and the like. Further north there is then a small shopping centre with a BP Station on the corner of Landscape and Mt Eden Roads. The more recent housing is higher density, being apartment or townhouse style, particularly in the Hunters Quarry site.

[26] The only activity permitted in the Business 7 zoning for the Three Kings Quarry is quarrying. It is intended that if this consent is granted, there would be a period when both the quarrying activity and filling activity would occur. As noted, the existing consent for dewatering would continue until 2030, at least.

Western Springs Aquifer



[27] We have already noted that the Three Kings Quarry is surrounded by a tuff ring, being the original volcanic cone. There is a low lip in the area of Dukes Road and Mt Eden Road, probably in the order of 300m to 400m wide.

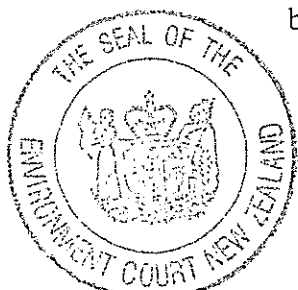
[28] We accept the expert evidence that any overflow from the Three Kings Aquifer would flow through this area and then into the Western Springs Aquifer. We have concluded that the estimate of around 2,200m³ of water per day, (the same as that currently pumped from the site), would be contributed to Western Springs in overflow, if pumping ceased and groundwater returned to normal levels. This figure would vary with season (evapotranspiration) and rainfall.

[29] We understand that further to the northwest there may be underground waterways through the basalt and gullies near the Meola Reef area in particular. We acknowledge that there is a surface flow commencing around Mt Albert known as Meola Creek. We also acknowledge that there may have been some contribution from the Three Kings Aquifer to the base flow of this creek, although the explicit connection is not clear. We were told that Meola Creek has a low base flow in summer, and that it also takes stormwater and sewer overflows, including that from a Watercare combined system. Watercare has a long-term plan to remove sewer and stormwater overflows from creeks, but it has no immediate plans in this area.

[30] The water from Meola Creek meets up with other waters which have been underground and surfaces at Western Springs Lake, this water exits as surface flow, being Motions Creek and Meola Creek, and as underground water seeps at Meola Reef. This essentially follows the basalt flow from Three Kings cone, down through the Western Springs Aquifer to Meola Reef itself.

The Proposal

[31] Having set the general scene, we now outline briefly the applicant's intentions. This is to fill the site progressively with fill materials as it is quarried out. Winstones intends to rely upon the surcharge of fill to generally compact the lower fill over the site, although some distribution of materials will be affected by employees and some limited compaction achieved by machinery on site. The last five metres of fill will be engineered and compacted to sustain a range of building activity (residential, business, light-industry) but not multi-storey tower building.



[32] It is intended that a range of materials identified as cleanfill materials in the MfE guidelines (annexed hereto and marked **A**), will be utilised for the site and that finished contours will generally slope from the north to the south to marry with existing contours of Mt Eden Road and Hunters Quarry.

[33] It is intended that there will be up to 375 trucks a day, which would include quarry trucks while the quarry continues working. Existing noise and dust controls will remain in place. This includes a comprehensive sprinkling system and use of a watering truck on site.

[34] It is anticipated that at least 50% of the materials on site would be from pre-approved contractors, and particularly from large projects. The other 50% of material will be supplied by casual contractors. Only contract trucks could supply (no private suppliers) and it is anticipated that most of these would be contractors that generally use Winstones, but may utilise more than one site.

[35] In support of this proposal, Winstones proposes a comprehensive suite of environmental controls for:

- [a] the type of materials;
- [b] maximum levels of contaminant that may be received;
- [c] the rolling averages of contaminants in the materials; and
- [d] various triggers to identify contamination responses in respect of groundwater.

This will of course involve significant issues of monitoring and control for entry of fill materials onto the site and for groundwater.

[36] It is also acknowledged that the final use of the site would be subject to planning changes yet to be undertaken. It is anticipated that different maximum contaminant levels would apply to the top 2m of soil which could come into contact with humans. The overall objective is that the fill as a whole does not exceed the background levels provided for in Regional Council document TP153.



[37] The conditions require a number of procedural steps which involve the development of comprehensive management plans for standards being specified within the consent itself. Annexed hereto and marked **B & C** is a copy of the conditions of consent produced in closing by Mr Matheson. It addresses a number of issues raised during the course of the hearing and we acknowledge is a significant change from the conditions of consent granted by the Council, or even those suggested in the first brief of evidence from Mr Sargeant.

The Parties

Envirowaste

[38] Envirowaste is an acknowledged trade competitor to Winstones, and operates two particular fill sites in the Auckland region, being Greenmount and Hampton Downs.

[39] Greenmount is a landfill which has now reached the capping layer stage. For the final capping layer Envirowaste applied for a resource consent controlling the contents of that fill. Initially they obtained consent for cleanfill which specified contaminant levels largely in accordance with TP153. Mr L Dolan, an environmental consultant, gave evidence for Envirowaste. He advised that:³

... ESL Greenmount Landfill, [operated] from November 2006 until September 2008, when the site was operating as a cleanfill (trace element concentration maximums TP153 and nil organics).

[40] He then provided a table comparing various figures showing the level of various contaminants measured at Greenmount capping layer to September 2008 (we have only included TP 153 and Greenmount from the table):

Table 7.1 Proposed Rolling Mean and Cleanfill Mean

Parameter	TP 153 Auckland Region Background Maxima (mg/kg)	Greenmount Landfill Cleanfill Mean (784 Samples) (mg/kg)
Arsenic	12	5
Cadmium	0.65	0.1

³ Dolan, EIC, at [7.22]



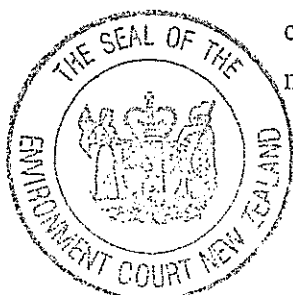
Chromium	125	35
Copper	90	25
Lead	65	37
Mercury	0.45	0.08
Nickel	320	36
Zinc	1160	75
Petroleum Hydrocarbons C ₇ -C ₉	-	1*
Petroleum Hydrocarbons C ₁₀ -C ₁₄	-	6*
Petroleum Hydrocarbons C ₁₅ -C ₃₆	-	128*

* Non detected in a result was entered as zero when calculating the mean.

[41] What this clearly demonstrates is that the cleanfill, being received at a site in the Auckland region, with similar intent to the current application, did not receive materials with a mean outcome anywhere near the figures suggested in TP153. Mr Dolan did not give the figures for Greenmount after 2008 when it amended its consent to allow higher maximum levels. We can only conclude that Mr Dolan, in making the applications for higher concentrations, did not consider that there was a risk to human health, given that this is dealing with a top layer of land to be rehabilitated for open space, recreation and sport.

[42] The Greenmount consent was amended in 2008 to provide for 1,000,000m³ of material with higher levels of contaminants. The Winstones application can be compared with that sought in the Greenmount variation (set out as Exhibit G which is annexed as **D** in this decision). This sets out various figures, and it can be seen that those of Winstones are listed as Items 10, 11, 12 and 13. Of relevance for current purposes are the maximum figures for > 2m of depth fill and <2m of depth of topsoil, these can be compared with Greenmount. In respect of the topsoil, it can be seen that the maximum figures now proposed by Winstones are higher than those adopted for Greenmount in relation to boron, chromium, copper, nickel, lead. In relation to deeper fill, arsenic and nickel are both proposed to be higher, but some others (e.g. cadmium) are intended to be less.

[43] We received no evidence as to what impact, if any, the higher maximum levels had on materials received at Greenmount. Mr Dolan must have had material from September 2008 to date, but chose not to give it to the Court. Nor did he say that a wider range of material had been accepted or whether any levels exceed the maximum levels set out in the amended consent. We conclude that unless the materials are contaminated, they are likely to be in the general range of Auckland sites and any minor increase is likely to be localised i.e. zinc from downpipe discharge soils.



[44] The majority of experts accepted that if the soils were contaminated, they would have a particular contaminant at levels far in excess of those provided for as maximum levels in Winstone's proposed consent. Even if they were at or close to the maximum for a particular contaminant, it is most unlikely that they would have maximums for the full range of contaminants. The reason for this is that elevations of particular contaminants (i.e. DDT from pesticide, hydrocarbons from garages or machinery operations), are likely to be related to a single activity.

[45] The Council is required to identify all contaminated sites within the Auckland region and these are identified and known as HAIL sites. Any removal of fill from a HAIL site requires particular consideration, investigation and certification.

[46] Envirowaste filed an appeal to this Court on the basis that the fill is not cleanfill (as defined), and that the consent should not be granted. In opening, Mr Kirkpatrick made it clear that they sought only the imposition of reasonable conditions to ensure that the site received cleanfill products and not contaminated products. We took it that Envirowaste had abandoned the relief seeking refusal of consent. Nevertheless, some witnesses for Envirowaste were intent upon significantly more onerous controls than those that applied at Greenmount, and arguably for controls so onerous as to prevent the activity at all. In this regard the failure to identify a source for soils that were contaminated to the levels suggested was never explained to this Court. Given the 200m³ maximum from any one site before pre-approval even 10 unidentified contaminated sites could yield no more than 2,000m³ of fill or 0.066% of the total fill. Even 100 sites would still not produce 1% of the fill volume. Thus the mass loading of a particular contaminant is attenuated by the overall fill volume and the limitation on fill volume from any one site.

The Residents Groups

[47] SEPG, STEPS and TKUG have all had active involvement in the area over many years. There have been ongoing concerns about the operation of Three Kings Quarry and the dewatering well, and Dr Bellamy for SEPG outlined some of these concerns as did the TKUG group. Concerns have included noise, dust and traffic. In more recent years the dewatering consent has led to concerns about potential subsidence. Which aquifers were fed from Three Kings have also been the subject of debate over many years. The residents have also had concerns that if the site was refilled and then the dewatering ceased, that this may lead to other problems as the



water levels rose again, particularly if there was a prospect of it being drawn down quickly from time to time.

[48] It would be fair to say that the major concern of the residents in relation to contaminants was the potential to contaminate the groundwater supply and thus the Western Springs aquifer, and also for the potential of materials arriving on site to become airborne and contaminate nearby properties and people. The conditions of consent sought to address these matters in various ways, with further improvements being provided as late as the final closing.

The Auckland Council

[49] The former Auckland Regional Council and Auckland City Council both granted the consents. The subsequent appeal by Winstones has sought variation of the conditions and this has been the subject of ongoing discussions between the parties.

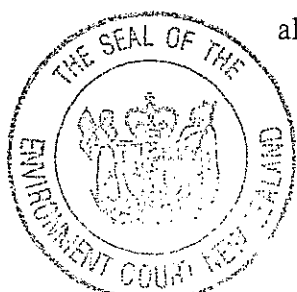
[50] The position had been reached by the opening that the Council and Winstones were agreed on all conditions, subject only to a debate as to whether the Council was to certify or approve management plans. In the end, this matter was resolved between the parties with suggested wording to the relevant conditions which require a review, certification or approval, with the following words:

Note that for the purposes of this consent review, certification or approval by the Council means assessed by Council staff or consultant acting in a technical certification capacity, and in particular as to whether the document or matter is consistent with or sufficient to meet the conditions of this consent.

[51] It also transpired that the Council owned the site to the south of Three Kings. As we have discussed, this has issues relating to the storage and leaching of organic materials which needs to be investigated by the Council urgently.

Watercare

[52] Watercare were a Section 274 party only to the direct referral. They held particular concerns in relation to potential of fill to contaminate groundwater. However, by the time of the hearing they considered that the proposed conditions (and also those now annexed hereto as **B**) met their particular concerns by:



- [a] Addressing the materials to be brought onto the site; and
- [b] Ensuring that there were appropriate trigger levels below MAV which required the applicant to take steps to avoid adverse effects on water quality.

The Issues

[53] The major issue advanced by Envirowaste was whether this site was a cleanfill site as proposed. This argument became largely redundant with the application for general fill as a full discretionary activity, compared with a cleanfill as a restricted discretionary. Nevertheless, the significant modifications made to the proposed conditions, both prior to the hearing and by the end of the hearing, meant there was greater specificity about what materials could be brought onto the site and the permitted levels of various contaminants within it, both at a maximum level and on a rolling mean basis. Envirowaste raised concerns about the rolling mean, although some of its expert witnesses supported this approach. Envirowaste also raised the issue, supported by the Residents, that an air discharge consent was also required.

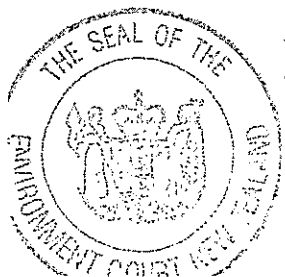
[54] We understood that all the experts agreed with the proposition that cleanfill was material that when buried, had no more than a minimal adverse effect on human health or the environment. Counsel accepted that where there was a de minimis effect, then this could be properly disregarded by the Court in reaching its assessment.⁴ In assessing the adverse effect, it was acknowledged that it was appropriate to consider effects that may have a low risk probability of occurrence, but nevertheless had significant consequences.

The Air Discharge

[55] We deal very briefly with the issue of air discharge. Our view is somewhat simpler than that put to us by various consultants. *Rule 4.5.1* of the *Auckland Regional Plan: Air, Land, Water* provides as a general permitted activity:

General Permitted Activity Rule

⁴ See *Bayley v Manukau City Council*, [1998] NZRMA 513 at [521]



4.5.1 Unless provided for otherwise in this plan, activities that discharge contaminants into air are Permitted Activities, subject to the following conditions:

- (a) That beyond the boundary of the premises where the activity is being undertaken, there shall be no noxious, dangerous, offensive or objectionable odour, dust, particulate, smoke or ash; and
- (b) That there shall be no noxious, dangerous, offensive or objectionable visible emissions; and
- (c) That beyond the boundary of the premises where the activity is being undertaken there shall be no discharge into air of hazardous air pollutants that does, or is likely to, cause adverse effects on human health, ecosystems or property; and
- (d) That beyond the boundary of the premises where the discharge into air of agrichemicals or paint or power coatings is being undertaken there shall be no drift or overspray from the application.

[56] If the activity is not covered by *Rule 4.5.1* or any of the other specific rules, then it becomes a discretionary activity by virtue of *Rule 4.5.2*.

[57] *Rule 4.5.44* includes:

4.5.44 The discharge of contaminants into air from the storage, handling, redistribution, or repackaging of minerals, ores and/or aggregates is a Permitted Activity, subject to conditions (a) to (c) of Rule 4.5.1.

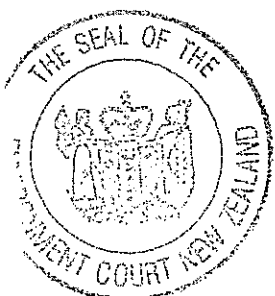
[58] *Rule 4.5.46* provides:

4.5.46 The discharge of contaminants into air from cleanfills is a Permitted Activity, subject to the conditions (a) to (c) of Rule 4.5.1.

[59] *Rule 4.5.49* similarly includes earthworks:

4.5.49 ... which includes the disturbance of land surfaces by blading, contouring, ripping, moving, removing, placing or replacing soil or earth, or by excavation or by cutting or filling operations.

[60] We conclude on the wording provided that the application for activity in this case also constitutes earthworks, whether or not the application is for cleanfill as that term is defined in the Regional Plan. Nor can we see any other provision that would not enable *Rule 4.5.1* to otherwise apply. We conclude that it would still be a permitted activity as earthworks provided the criteria of *Rule 4.5.1* are met, which is the applicant's intent.



Cleanfill

[61] Cleanfill is defined in the Auckland Regional Plan as:

Cleanfill

A cleanfill is any land that only accepts cleanfill material.

Cleanfill material means material that when buried will have no adverse effect on people or the environment: and includes virgin materials such as clay, soil and rock, and other inert materials such as concrete or brick that are free of:

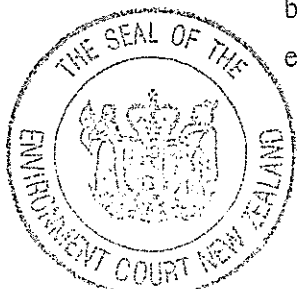
- Combustible, putrescible, degradable or leachable components
- Hazardous substances
- Products or materials derive from hazardous waste treatment, hazardous waste stabilisation or hazardous waste disposal practices
- Materials that may present a risk to human health
- Liquid waste

[62] Interestingly, inert materials are described to include concrete, and accordingly, the meaning of the words degradable or leachable must be taken in the context of concrete being described as inert.

[63] We have concluded unanimously, and by a wide margin, that cleanfill is here used primarily to describe the type of material accepted. It is appropriate to include maximum concentrations for contaminants to ensure the fill consists of materials that when buried will not have a significant impact on the environment or human health. The potential for contaminants in the material to be soluble or to be adsorbed or to be filtered by soil, creates a potential for the materials when placed in the fill to contaminate water and have an effect on people or the environment. In this case, the only argument related to whether it had the potential to alter the chemical constitution of the groundwater to such an extent that it could have an effect on either people or the environment.

Risk

[64] The Court has frequently said that the Act is not a no risk statute. This acknowledges that in all human enterprise there is always an element of risk. There are those risks that can be foreseen and prevented. But there are other risks which are beyond the best design or intent and can confound all human endeavour i.e. earthquake or volcanic activity.



[65] In examining risk under the Act, the Court therefore must take a practical and robust approach to both the risk itself and its prevention. After examination of a number of expert witnesses, it appeared to be agreed that the risk we were examining in this case is the risk of importing contaminated material in such quantities as to lead to impacts on the groundwater sufficient to harm human health or the environment.

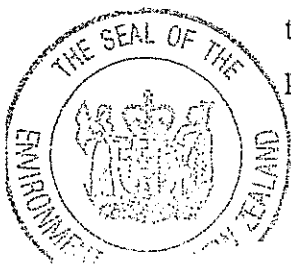
[66] It was accepted that the applicant's compliance with the more restrictive of the MAV maximum allowable values for drinking water standards, or the ANZECC values would avoid adverse effects on human health or the environment. We then pursued throughout the hearing the question: What is the risk of contaminant levels in the water exceeding those values?

[67] We noted firstly that the trigger values for mitigation action were at less than half of the MAV/ANZECC values and that the actual values likely in the fill material at the current time are orders of magnitude lower again. All witnesses agreed that the types of soils to be placed at the site and the steps to be taken in relation to placement and compaction were such that the prospects of high water transmissivity through the fill material was low. Although several of the experts suggested that there might be preferential flow paths, they also acknowledged that this would mean less leachable material because less material would be exposed to the water. Controls on contaminate testing of materials submitted for acceptance in the fill and limits on load size before testing was required and working, mixing and compacting of the fill material at the face will limit the extent of any possible preferential flow path in the fill.

Modelling and Mass Loading

[68] Modelling of water flow through the fill was performed to simulate a 5,000 year period and assumed a maximum value of all contaminants throughout all of the fill at a homogenous level. This model provided for constant dewatering throughout the period so that infiltration flow from rainfall through the fill was at the maximum at all times, as were the outflows.

[69] In our view, this was a very conservative scenario. We are unable to envisage any basis upon which the maximum values of contaminants could be contained throughout the entire fill. Given the requirement to meet the mean values, the testing proposed and the unlikely event of material coming from a significant unidentified



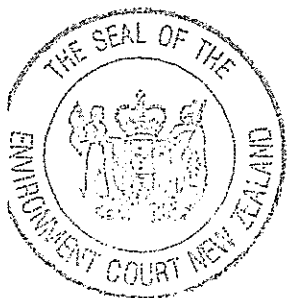
contaminated site in the region, we very much doubt that the overall levels will be very much dissimilar to those for the capping layer at Greenmount and/or in general background average for the region.

[70] In our view, the adoption of a rolling mean average weighted with the mass of loads means that all approved sites can be assumed at the levels identified in the various reports. For material not subject to pre-approval, the sampling of each 150th load, will lead to that concentration being attributed over the previous loads. Although there can be some variety in that, it means that any failed load would be attributed over the previous 149 non-preapproved loads. It is highly unlikely that loads from a series of different sites would have uniform contaminant levels. Over the time of the filling, the sampling numbers will mean that statistically the prospects of the materials varying much from the average of all samples becomes less and less.

[71] Fundamentally, the materials that can be put into this site are ones that occur in the Auckland region, and will almost always be natural materials related to site redevelopment, roadworks and the like. We have no reason to believe that they will be atypical of the material types occurring in the region. In fact, particular controls are required for large quantities from one site (testing and pre-approval) and specific testing of material from identified contaminated sites. Also relevant to that consideration is our conclusion that it is the mass contaminant levels of the entire fill which will have the impact, not particular loads.

[72] Our reasoning for this is that possible groundwater contamination from the fill is based upon the amount of water moving through the fill and that infiltrating the site. In addition to that moving through the fill itself are the other waters being received at the dewatering well from the surrounding 600 hectares. In those circumstances, the dilution of any fill leachate by other groundwater has been variously estimated by differing witnesses between 18 to over 100. Thus, any contaminant in any leachate from the fill would be further diluted by the other groundwater and would be inconsequential in the context of the overall water and mass which is contributing to the groundwater quality. We keep in mind that the Three Kings site is only a small part of the 640ha Three Kings Aquifer.

[73] We also take into account that existing information on the performance of the soil types shows a high level of adsorption and filtering already by groundwater, and



we have no reason to believe that this would not occur with any contaminants that might be included within the fill mass.

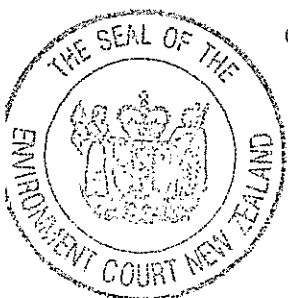
Controls on Risk

[74] Given the requirement for pre-approval for any known HAIL risk sites, we consider that the potential for casual loads to significantly change the mass parameters are de minimis:

- [a] There are controls over the maximum quantities of the identified contaminants within the fill;
- [b] The sheer mass of 3,000,000m³ of fill;
- [c] Testing and observation of loads;
- [d] The controls to identify deviation from both the mean and maximum figures;
- [e] The limits on the casual loads of 200m³; and
- [f] The significant dilution of the Three Kings aquifer at some 2,200m³ per day.

[75] We conclude that the levels of the various determinands in the dewatering well are a function of the overall composition of the fill and the surrounding catchment area. We conclude that the model over-estimates the effects of leachate from fill on groundwater quality. We conclude that any leachate will also be diluted by the waters drawn down by the dewatering well, reducing the overall effects of any contamination to de minimis levels.

[76] Nevertheless, we accept that there is a very small risk that gross non-compliance by contractors could escape oversight and have some effect on contaminant levels. To avoid this very remote possibility, the applicant has agreed to an extremely comprehensive monitoring and audit process. This includes testing every non pre-approved load by XRF testing. This will identify mineral levels in the



samples and would give a very high level of confidence that the consent conditions have been complied with.

[77] There was some suggestion that the levels from XRF testing did not exactly coincide with laboratory sampling. We agree that there is a variation in correlation variation, depending on the amount of moisture in the soil. Some readings are high, some are low. Again, our concern is not with precise numbers, but with gross contamination. We are very confident that XRF will pick out gross contamination, at least in respect of the elements which it identifies.

[78] There was a suggestion that we should also test for other substances using other methodologies, including Photometric Infrared Detection. The staff currently visually inspect each load, and use olfactory tests for hydrocarbons and other volatiles. We consider that this is sufficient to protect against this possibility of gross contamination.

[79] We keep in mind that there is laboratory testing of 1 in 150 loads, and if any serious non-compliance was encountered, it is likely that Winstones itself would take serious action against the contractors. We also consider that such controls are ones likely to be seen as reasonable by contractors and not lead to deliberate attempts to breach.

[80] Overall however, we consider that the obligations imposed by this consent are more onerous than any other modern landfill, or any other controlled fill site we are aware of. In addition to the XRF testing of each casual load, the applicant will:

- [a] Test every 150th load by laboratory sampling;
- [b] Any loads deposited after laboratory testing from the same site, which then shows non-compliance with the conditions enables Winstones to test and extract those later loads from the site;
- [c] Every load is subject to both visual and olfactory examinations on at least two occasions:
 - [i] At the gate; and



[ii] At the tip site.

- [d] Mass leachate issues are addressed with regular water testing at both water extraction sites and one background test, suggested currently at Bore Hole 7, which is not currently influenced with the well extraction;
- [e] Constant monitoring of PH and conductivity. These levels need to be set by the applicant.

[81] Our overall conclusion is that the application by its nature is one which would avoid adverse effects on human health and the environment by the utilisation of cleanfill materials. To provide a very high level of assurance in respect of existing quality drinking water beneath the site, conditions avoid any potential adverse effects and give a very high level of confidence that there will be no effect on human health or the environment from the granting consent.

[82] Given the conditions that are now proposed, we conclude that the application is for fill within the parameters of TP153, and accordingly, that consent can be granted on a restricted discretionary basis. Given the very limited nature of the discretions involved, Mr Kirkpatrick acknowledged that consent should properly follow if we concluded that the proposal was for cleanfill. Nevertheless, we consider that the conditions give a very high level of public confidence in respect of water quality and the avoidance of any adverse impact upon human health or the environment.

The Water Extraction Consent

[83] In reaching this conclusion we have assumed that the application will be subject to the modifications proposed as conditions, including a condition to continue water extraction from the well on-site. Given that Winstones holds a consent to operate this activity until 2030, they intend to operate for that period, or 5 years after the cleanfill is concluded, whichever comes first. This does not, of course, prevent Winstones, or another party, seeking a further consent for abstraction for water, nor does it mean that any abstraction after 2030 needs to occur.

[84] There was much argument as to the extent to which this Court should take into account the fact that the consent of Winstones abstraction consent expires on 2030.



This refers in turn to what is the environment as described in the Act and set by the Court of Appeal in *Queenstown Lakes District Council v Hawthorne Estate Limited & Anor.*⁵ Our understanding is that the environment is that which is existing, that which is permitted by the Plan, and that for which consents have been granted, if unimplemented (at the discretion of the deciding authority). In this case there are no unimplemented consents. Although we can assume that in the future there may be the prospect of the consent ending, we do not consider that that has any particular impact in this case, given that the dewatering would continue until 2030 or 5 years after the filling was completed (at the minimum). We can assume that within that time, maximum likely leaching of any materials is likely to occur. We consider capping of the fill will significantly reduce the potential for contamination.

[85] Although it was suggested to us that these materials had scales of hundreds of years to move several metres, we think that any material that is moving at that pace is likely to take many centuries to reach the dewatering well, given that it is around 30m under the site. It appears to us likely that any consideration for recharge or abstraction will be carefully considered in light of the likely geological conditions known at that time. It may be that by this stage, the water treatment station constructed by Watercare would be utilised for a potable supply for the local population.

Recharging of Western Springs Aquifer

[86] Other groups, including particularly STEPS, suggested that the groundwater should be recharged so that the overflow recommences into the Western Springs aquifer by potentially recharging Meola Creek and other groundwater. It was then suggested by some witnesses that the flow of water over the tuff lip may create some horizontal pressure through the fill thus leaching contaminants. We prefer the evidence of Mr Burden and others on this issue, and do not consider that recharging the aquifer is likely to leach as much material as the full dewatering. Given the very low permeability of the fill soils involved, we consider that the overall effect of groundwater recharge would be simply to have the groundwater around Three Kings move through the scoria, leaving the rehabilitated area to release water more slowly due mainly to pore pressure as the groundwater level falls. Given that in the normal course groundwater levels are unlikely to fluctuate by more than 2m, we suspect that

⁵ (CA) [2006] NZRMA 424 at [84]



there would be very little water flow into general groundwater from the fill site, given that the pore pressures near the surface of the fill would be significantly lower than they would be deeper in the fill.

[87] There was some suggestion that Bore Hole 7 would not pick up flows from Three Kings. We do not agree, and have concluded as a fact that Bore Hole 7 is an appropriate bore hole to measure water flow from Three Kings Aquifer to the Western Springs Aquifer if dewatering ceases. We do accept that there are other intermediate sources of contamination which may confound any results, but those sources are existing already, including the BP Station and a number of properties and roads, as well as the former Hunter Quarry site rehabilitation. Overall, we have concluded that any effective groundwater recharging of the site would have de minimis effects in terms of potential discharges from the fill site and should be disregarded for current purposes.

Conditions

[88] In reaching these conclusions we have discussed the conditions in generic form only. During the course of the hearing those conditions have been improved significantly to the extent where they now would represent an average contaminant level within the fill site compatible with TP153 and very low levels of other forms of contamination. That appears to be accepted by most of the expert witnesses before the Court. The applicant has now incorporated a suggestion by the Court that all material should be sourced within the Auckland region. Questions of sampling gave the impression that it was necessary for the Council to undertake regular sampling at set times, but not at others. It is the intention of the Court that the Council is able to undertake full sampling tests at the cost to the applicant at least twice a year at random intervals. It is intended this would comprise no more than two core samples (or composite samples) for testing. We also do not intend that this would prevent the Council carrying out a random audit (at any time), with or without additional sampling, at its own cost. In the event that a breach of condition was established, it seems that the Council would in those circumstances seek reimbursement from Winstones. Condition (13A) needs to be amended accordingly.

[89] Condition (19) also troubles the Court as a matter of detail. In respect of groundwater contingency, we conclude there should be three levels of contingency:



- [a] Where 50% of MAVs are reached. Various steps in Condition (19) are not all mandatory, nor are they particularly helpful in advising what must occur. It seems to us that at the 50% level, further testing must be undertaken and a remedial plan set in place to achieve the water levels return the normal range. The normal range would need to be defined, but one assumes that it is the average of all samples prior to a marked upward trend in any figure being detected. It also needs to deal with the question where the upward trend is attributed to something other than the operation of Three Kings fill operations. This would seem to involve reporting to the Council and Watercare, and participating in any meetings to identify mechanisms for remedial work to lower the particular trend line;
- [b] At 75% - 80% of MAV the condition could require the remediation plan to consider the dewatering of the site, or any other interventions necessary to achieve treatment. This might include dewatering and treating the dewatered site then reinjecting the water. The actual methodology might be set out in a rehabilitation plan. However, it does seem that one would need to see a downward trend within 3 – 6 months with a figure of less than 50% MAV being achieved within a reasonable period of time (i.e. 1 year). It would also need to deal with whether or not fill should continue to be received in the meantime if the site is still open;
- [c] Where the trigger levels are reached for MAV or ANZECC then the question arises as to what steps should be taken further. As a matter of practicality it appears that if this level is reached, then the contingency plans have failed and the applicant would be in breach of the resource consent. Accordingly, there needs to be a clear condition of consent that levels of the various determinands will never exceed the MAV or ANZECC limits included. If they do, it would be for the Council to decide on the appropriate course of action. We assume a full Section 128 review of the consent would be appropriate including any remediation conditions necessary to remedy the contamination.

[90] We agree with those who criticise the current conditions as suggesting that you can obtain a resource consent for breaching the conditions of consent.



Accordingly, the reference at the end of paragraph (19)(f) is inappropriate. We agree that items (g), (h) and (i) are helpful, but a rewording of the entire condition may make the various trigger points and their actions clearer. A condition should also be included that on an annual basis as part of the full management plan, the consent holders will supply to the Council an annual water monitoring plan to be certified by the Council.

[91] We have concerns about Condition (21). We are unable to see why changes can't be required annually, particularly where there may be some new identified human health issue. We have concluded that this condition could be simply amended to require an annual review of the fill management plan.

[92] Condition (22) should be reviewed to provide for annual reviews for the first three years after the commencement of the consent and in the event that there are no reviews required for three consecutive years, then every two years thereafter. The review should deal with any actual or potential adverse effects on human health or the environment which may arise from the exercise of this consent deleting the balance of that clause.

[93] In relation to the land use conditions, we consider that the rolling average should be referred to as a weighted rolling mean, and Condition (11) should be amended to reflect that and any other reference to rolling mean contained in the decision.

[94] After the first sentence in Condition (14) we would add:

Certification by the manager is required prior to the commencement of filling.

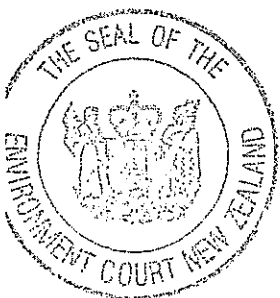
[95] Condition (14)(c) should be amended to include a fill contour plan for the following 12 months of operation.

[96] Condition (25) should read:

The refuge is to be installed prior to the filling operations commencing.

[97] At Condition (35), 1991 should be changed to "*thereafter*".

[98] Condition (35)(f) should continue by inserting:



... any measures are implemented (where necessary) to the satisfaction of the Manager to protect human health and the environment.

[99] Generally we would also require that the activity consent is also included with the conditions and that the relevant maps are attached. In particular on this site, this would involve the final full contour map which needs to be amended to more properly reflect:

- [a] Contour rising towards Big King Reserve on the northern portion of the site;
- [b] Relating to the topography at Hunters Quarry by way of battering or the like;
- [c] Providing for connection to Mt Eden Road, preferably sloping from Big King Reserve towards Mt Eden Road;
- [d] Providing for the complications of the Council site and the recreation playground at the southwestern end of the site, probably by battering the slopes; and
- [e] Providing some natural form and indication as to how drainage is to be provided (which we understood to be peripheral).

Councils' decisions

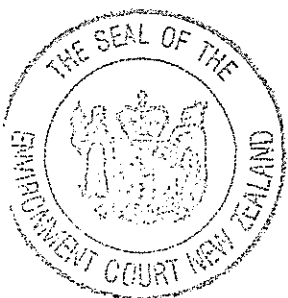
[100] Finally, we note that the outcome of our consideration of this matter reaches a similar conclusion to that of the Commissioners. Under Section 290A of the Act we have had regard to that decision, but consider it of limited usefulness given the significant changes to the proposed conditions of consent. However, the approach of both groups of Hearing Commissioners is consistent with our decision.

[101] In particular, we note the ACC Commissioners for the Council at page 20 of the Hearings Report:

10.6 The composition of the fill material and whether it legally constitutes "Cleanfill" ...

...

We have carefully considered the evidence from both Mr Burden and Mr Dolan in that respect and conclude that provided the sampling



regime and methods for managing the quality of the Cleanfill are rigorous then the proposal will fall within the term "Cleanfill" and as such as a controlled fill activity will be consistent with the District Plan. ...

[102] We agree and would add that it is also consistent with the Regional Plan.

The Direct Reference

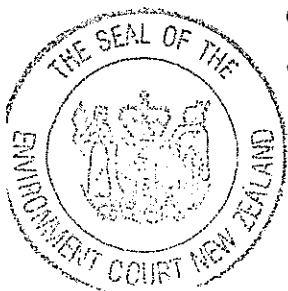
[103] The direct reference is a fully discretionary activity and the applicant proposes that it should proceed on the same basis as the application for resource consent. Given our conclusion as to the previous application being cleanfill, under the Proposed Plan it would follow that this application should be granted consent as a discretionary activity because it meets the criteria for cleanfill and is otherwise in accordance with the general criteria of the plan. Given our view that the cleanfill consent is the more appropriate consent, we would normally not have considered it necessary to take this matter further.

[104] However, Mr Matheson tells us that his client is particularly concerned about trade competition and the potential for Envirowaste to appeal the substantive decision and thus delay the implementation of the consent. Given that concern we will address the application for a general fill resource consent on its merits.

[105] Given our general conclusion as to compliance of the previous application with the general provisions of the Plan, it would follow that a controlled fill in this form would avoid adverse effect on the human health and the environment, and accordingly, rehabilitate valuable inner-city land for other purposes. With the extensive suite of controls, adverse effects on the environment would be de minimis and human health and the environment would be protected.

[106] Accordingly, we would be providing a scarce resource within the urban area which would be available for the most appropriate use at the time that it is ready. This would require a planning process, and thus the process for its final use is one which can be reserved for a later date.

[107] As Business Zone 7 land within the Auckland Council area, its reclamation by controlled filling excluding refuse disposal is a full discretionary activity under *Rule 8.7.4.3*:



2. Reclamation by controlled filling excluding refuse disposal

... The outline plan will indicate how the operators intend dealing with such matters as:

- noise, odour, pests, dust and material dispersal nuisance;
- fire risks;
- type and amount of material and method deposit and cover;
- type and conduct of vehicles with delivery access;
- hours of operation;
- effluent monitoring and disposal;
- stormwater management;
- where the extraction is still ongoing those methods undertaken to ensure compatibility of operations and maintenance of safety aspects;
- security;
- landscaping screening and fencing

...

[108] The Plan goes on to say:

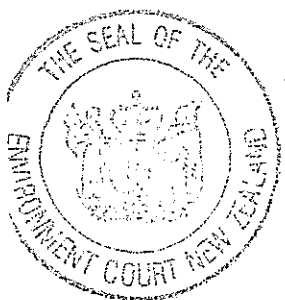
The activity is regarded as transitional. Accordingly the outline plan must indicate what the final state of the land will be, and it must demonstrate a land form suitable for subsequent use.

[109] Importantly, this does not go on to give a range of criteria to be addressed. It is important to recognise that generally speaking, quarrying activities which are controlled need to include in the management plan provisions for progressive rehabilitation before quarrying ceases and rehabilitation objectives and possible techniques and an indication of the range of potential activities which could utilise the quarry when extraction is complete.

[110] Given the lack of any particular criteria within the Plan, the more general objectives and policies of the Plan are summarised by Mr M Weingarth, senior planner with the Council:⁶

51. Part 2 of the District Plan sets out the scope of underlying principles which form the objectives and policies relating to various aspects of development within the city. In principle, the District Plan seeks to achieve the sustainable management of the resources, whilst allowing for economic and urban growth at a rate that does not

⁶ Weingarth, EIC, at [51] & [52]



detract from the existing environment. It also takes account of heritage issues, natural environment issues and social needs.

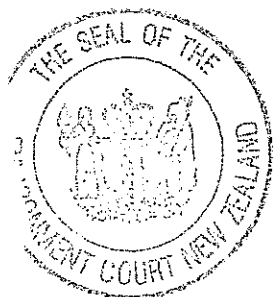
52. Overall, I am of the opinion that this proposal will generally adhere to the principles of the District Plan as it will help to enhance the availability of land and other important building resources, whilst allowing economic development at a scale that protects the existing natural and built environment of the locality.

The Auckland Regional Plan: Air, Land and Water

[111] The Regional Plan has a wider range of provisions and we will address a number arising in terms of the Plan. As far as the Regional Plan on Sediment Control is concerned, it does not appear that this gives any particular concerns to planners or specialists. Although an earthworks consent is to be obtained, the natural internalised catchment of the quarry and the attenuation achievable both through the cleanfill and scoria is sufficient to satisfy the experts that there is no risk from sediment. For the most part, the existing quarry sediment and silt control works can operate until the land is filled.

[112] As far as the *Auckland Regional Plan: Air, Land and Water* is concerned, we have already addressed the air provisions in general terms. So far as the general objectives of the Plan contained in *Objective 5.3* are concerned, these seek to firstly maintain high quality environments and minimise adverse effects, and wherever possible, enhance degraded areas. If not dealing directly with cleanfills, avoiding any adverse effect from discharges from landfills is encompassed within 5.3(c)(ix). In broad terms it could be said that the objective of avoiding adverse effects on human health or the environment is subsumed within the objectives of Regional Plan. This includes discharges from stormwater, industrial processes, sewage treatment, land management, contaminated land and landfills. The discharge of contaminants from a cleanfill that doesn't comply with the permitted activity *Rule 5.5.48* is a restricted discretionary under *Rule 5.5.53*. Thus, it would follow that a full discretionary activity is nevertheless concerned with the discharges which may occur. That has certainly been the focus of the evidence given to us.

[113] Given our conclusions that there is no more than de minimis risk to human health or the environment with appropriate conditions, it must follow that the benefits of rehabilitating this land would assist in avoiding the site becoming contaminated in the future, and thus meet *Objective 17.3.3* of the Auckland Regional Policy Statement,



as well as the objective of maintaining water quality and water bodies (*Objective 8.3*) and *Policy 8.4.1*.

[114] Although the strategic objectives are at a very high level, no witnesses suggested to us that the provision of an integrated quarry and landfill site within the urban centre and close to some major proposed earthworks (including for example Waterview) would not achieve strategic objectives and policies for the region.

[115] The issue is of course that this must be done in a way that avoids adverse effects on human health and the environment in particular, and in a more general sense, avoids contamination of groundwater.

Other Matters

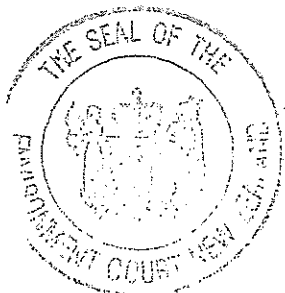
Section 104(1)(c) of the Act

[116] Having addressed adverse effects and the provisions of the relevant policies, we consider now whether there are any other matters which should be taken into account under Section 104(1)(c) of the Act.

[117] We have regard to the desirability of water being reintroduced to the Western Springs aquifer. Although we agree this would be desirable, we acknowledge that there is currently in place a resource consent to enable water abstraction to at least 2030 and that the recharging of the groundwater is unlikely to occur until after the site has been rehabilitated.

[118] We also take into account the many years of frustration of residents of Three Kings area, as expressed by Mr Bell and others. Their concerns are with the number of vehicles on the road, vehicle movements and the like. Although we acknowledge the potential amenity effects and traffic effects, we consider that these need to be considered in the context of a busy business and industrial area, protected by appropriate zoning (as Business Zone 7) and anticipated to generate traffic. The Plan also seems to envisage the rehabilitation of these quarry sites in due course, and accordingly, the intention is that the more enabled the owner is to complete the works, the sooner the land will be available for other purposes.

[119] We acknowledge the frustration of nearby residents with dust and noise from the site in the past. The use of aggregate and scoria crushers and sorting plant has



clearly caused noise and dust problems in the past. With the extensive sprinkler and truck wash system we are satisfied dust can and should be contained on site. In respect of noise, insufficient detail was given for us to be clear as to its cause. However, we anticipate that fill materials will be damp or covered to comply with traffic requirements. We also consider the noise of the machinery for placement of landfill is likely to have no discernable impacts. When the final cap forming is taking place we accept that there may be some noise, but it would be covered by the construction standards.

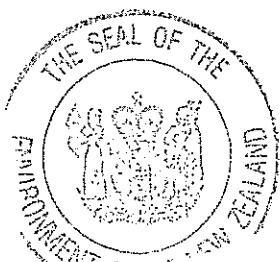
[120] Although we agree the question of trade competition could be relevant to our discussion at this point, we put that to one side given that we are undertaking a full evaluation. We believe a critical positive benefit of this application is that the works can be undertaken in a way that enables, not only the construction industry and the quarry owner to develop the land, but also provide for a scarce urban resource, namely, developed land which could be used for a wide range of uses.

Part 2 of the Act

[121] Turning to Part 2 of the Act, we are satisfied that the activity is providing for ordered development, utilising the region's material resources to rehabilitate a quarry in a popular residential and business area. That enabling can occur while avoiding adverse effects on human health or the environment, and thus enabling the wider community to provide for their needs for housing and business use, and/or recreation, depending on the end use of the land. Particularly, this land has the benefit that that final use can be one subject to a proper procedure by way of Plan Change in due course.

[122] We accordingly are satisfied that the activity meets the sustainable purpose of the Act. We recognise the legitimate concern of residents for human health and the environment, which includes:

- [a] Groundwater quality being maintained in case future human use is required;
- [b] Improving the current poor state of the Western Springs aquifer; and
- [c] Having some input into the end use of the land created.



[123] We are satisfied that all these matters are adequately provided for. In particular, the final use of the this land is a matter for the future Council, and should be addressed through some form of integrated land use planning. We agree with residents that this should addressed sooner, rather than later, because of the need to integrate this land with the surrounding land, particularly the Council reserves land and nearby parks, and the existing shopping centre.

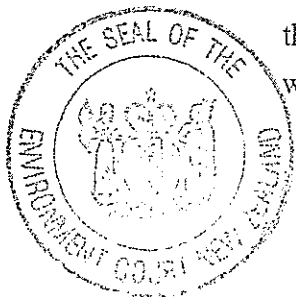
[124] In relation to the Western Springs Aquifer, the rehabilitation of this site does at least give the prospect of being able to recharge the aquifer, and thus allow water to flow towards Western Springs. We have concluded that in respect of traffic, dust and noise, there are no outcomes anticipated that will be any more serious than those under the existing quarry consent, and we anticipate dust and noise should reduce considerably. It appears to us that many of the concerns relating to the quarry operation, related to the crushing of rock and scoria. The traffic movements intended will be similar to the current operation. Some improvements are provided for in the conditions of consent, including encouraging all contractors to cover loads where feasible. In respect of dust and noise, there is a well-established sprinkler system around the periphery, together with watering trucks, and the applicant is confident it can meet the Council constraints at the boundary.

[125] Historical concerns relating to dust relate to the quarry operation. The landfill does not include any known dusty operations. Most fill material is moved promptly to the cleanfill site, and tends to be installed promptly without excessive dust generation. We note however that there are extensive dust control measures in place already.

Outcome for Direct Referral

[126] Although we have undertaken a more exhaustive examination of the criteria under the Act, the outcome is still the same. With the conditions proposed, the site can be rehabilitated with no more than minimal risk to human health or the environment. Put another way, the Court is satisfied that it represents sustainable management as that term is described in terms of the Act.

[127] Accordingly, we conclude that consent can be granted, both in terms of the decision appealed from, and in terms of the direct referral, and we would consider that the wording could clearly include cleanfill and/or fill, being material as described within the consent itself.



Expert Witnesses and Trade Competition

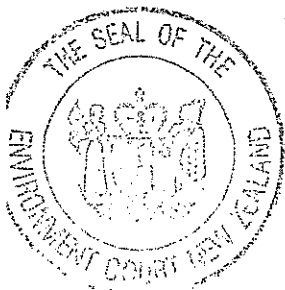
[128] We cannot leave this decision without addressing issues which came up in the course of it in relation to the role of expert witnesses. We recognise that the applicant's conditions of consent changed considerably from the time of the Council consent to the time of the closing of the hearing. By the commencement of the hearing the conditions of consent were such that the material in the fill would on average meet the criteria of TP153.

[129] We recognise the genuine concern and limited resources of the resident groups. Most of those groups would acknowledge that background levels of TP153 would be acceptable. There were some concerns about the calculation of the average, and Professor Triggs identified a number of these. In that regard, even most of the Envirowaste witnesses recognised that with the changes to the conditions, the application came very close to the definition of cleanfill within the Plan and also an activity that they would consider acceptable.

[130] One difficulty with many busy professionals is the limited opportunities that are given to assimilate changes of position which are adopted close to, or during, a hearing. Accordingly, although we reach decisions very different to those in the briefs of evidence for a number of expert witnesses for Envirowaste, we acknowledge that those opinions were prepared at a time when the change of position of Winstones was not known to them.

[131] Nevertheless, it is important, particularly where there is a trade competition case, that expert witnesses avoid becoming too aligned with the position of the client they are appearing for. In that regard, where there was conflict between the evidence of Winstones and Envirowaste expert witnesses, we have preferred the evidence of Winstones.

[132] The key witness for Envirowaste was Mr L Dolan, describing himself as an independent consultant. However, it transpired that Envirowaste represented 80% of Mr Dolan's 2009/2010 income and 95% of 2010/2011 income. Moreover, Mr Dolan has his office space within the Envirowaste premises using Envirowaste equipment, including stationery. His role included identifying prospective applications and bringing them to the attention of Envirowaste. In this case he was also instructed to draft the submission to the Council in respect of the application. At the very least,



this detail of Mr Dolan's involvement should have been given to the Court as part of his brief, and it is likely that Mr Dolan would not have been able to give evidence as an expert witness.

[133] Although trade competition did not become directly prohibited in terms of the Act until 1 October 2009, Section 104(3) of the Act has always provided that the Court may not take into account trade competition, or the effects of trade competition. The Court has always discouraged the use of the Act's provisions to delay competition or seek restrictions over a party which would make that party less competitive. The Court has consistently acknowledged that issues of public interest (i.e. in this case, human health or the environment) can be legitimately pursued even by a trade competitor. However, the Court will rigorously examine the evidence to satisfy itself that the trade competitor is pursuing legitimate issues under the Act, rather than an ulterior purpose of obstructing a trade competitor.

[134] Given that the evidence has already been advanced in this matter and many of the positions adopted by Envirowaste were also adopted by other residents groups, we have concluded that this is a matter that should properly be addressed in terms of any cost applications, rather than in terms of the merits of the proposal itself.

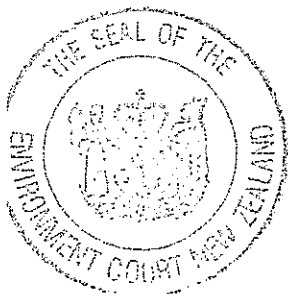
Directions

[135] We conclude consent should be granted on the appeal and directions referred.

[136] Winstones is to prepare a further set of conditions incorporating those annexed hereto as **B & C**, but including within it:

- [a] the consents;
- [b] a final fill contour plan; and
- [c] amendments to the conditions we have discussed.

[137] Both consents could be combined in a single consent for controlled fill. These are to be circulated to the other parties within 20 working days.



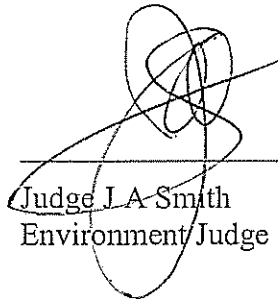
[138] The parties have 10 working days to comment upon those conditions. If agreement cannot be reached, Winstones is to file those with the Court within a further 10 working days (40 days total), together with any submissions as to its preferences.

[139] All other parties have to the same date to file their submissions for their preferred conditions, and the Court will then proceed to issue its decision.

[140] Any application for costs is to be made within 30 working days, and any reply thereto within 10 working days thereafter.

SIGNED at AUCKLAND this 18th day of May 2011

For the Court:



Judge J.A. Smith
Environment Judge

