

IN THE MATTER of the Resource Management Act
1991

AND

IN THE MATTER of a resource consent application
by Hydro Developments Limited

**OUTLINE OF SUBMISSIONS ON BEHALF OF SOLID ENERGY NEW
ZEALAND LIMITED**

**ANDERSON LLOYD
LAWYERS**

Solicitor: Mark Christensen

1. INTRODUCTION AND OVERVIEW

- 1.1** Hydro Development Limited's proposal to develop a hydro scheme on the Stockton Plateau has the potential to jeopardise Solid Energy's existing and future mining operations at Stockton Plateau and Upper Waimangaroa. These mining operations underpin the development of the local economy and contribute significantly to New Zealand's export earnings.
- 1.2** Solid Energy seeks that consent only be granted to HDL if suitable conditions are imposed to protect Solid Energy's existing and future mining operations.
- 1.3** These submissions set out:
- a.** A brief background on Solid Energy mining operations at Stockton Plateau and Upper Waimangaroa. This is covered in more detail in the evidence of David Horn, Solid Energy's National Consents and Environmental Programme Manager;
 - b.** The adverse effects of the HDL applications on Solid Energy's current, proposed and, potentially, future mining operations; and
 - c.** The basis upon which consents could be granted to HDL if you considered that the application otherwise meets the relevant RMA tests.

2. SOLID ENERGY MINING OPERATIONS

- 2.1** Solid Energy mines coal at Stockton Mine on the Stockton Plateau under Coal Mining Licence 37-150 (CML). This CML authorises the land use aspects of all of Solid Energy's existing and future mining activities until 30 March 2027. In addition, Solid Energy holds a range of water related consents for the take, discharge, damming and diversion of water within the CML area. These consents were issued in 1989 and remain in operation until 2027. These consents are known collectively as Water Right 89/38.

- 2.2 There is a substantial coal resource within the Stockton CML area yet to be mined. Mr Horn explains why accessing this coal is likely to require additional resource consents to the existing water rights. Recovery of the coal is necessarily a long term project that must be approached on a staged basis. This inevitably requires staged consenting for the water related aspects of the mining within the CML.
- 2.3 Solid Energy also holds a mining permit for the Upper Waimangaroa granted under the Crown Minerals Act (MP). This MP provides access to the Upper Waimangaroa for mining until 2038. The first stage of development within the MP area has been consented and is known as the Cypress Open Cast Mine. Solid Energy intends to consent additional mines within the Upper Waimangaroa MP area and investigative work is under way for that. As with Stockton, the development and mining of the coal resource in the MP area is inevitably a staged and long term project.

3. ISSUES RAISED BY HDL APPLICATIONS

- 3.1 The HDL applications are the first to have been made by a third party within Solid Energy's CML and MP areas. Solid Energy was initially of the view that the only issue arising from HDL's application would be access related and could be dealt with by agreement between the parties. It has recently become evident, however, that the HDL applications are likely to have significant implications for its mining operations that must be addressed as part of this resource consent process.
- 3.2 In his evidence, Mr Horn outlines a number of aspects of HDL's proposal that will require agreement from Solid Energy, including, for example, land access, a transmission connection agreement and modification of the Upper St Patrick's Dam. Any consents granted to HDL must be contingent upon it securing all necessary permission from Solid Energy.
- 3.3 In addition, and potentially of greater significance for Solid Energy's mining operations, the catchments affected by HDL's applications for diversions and takes of water are exactly the same as those affected by Solid Energy's existing water related consents.

- 3.4 Solid Energy's existing water rights must be taken into account in assessing the HDL applications. These rights form part of the "environment" that will be affected by the grant of the HDL applications and are relevant under sections 104(1)(a) and (c) of the RMA.
- 3.5 Solid Energy is not currently fully exercising all of its water rights for the Stockton CML and the Cypress Mine. This does not, however, detract from their relevance to this Hearing Panel¹.
- 3.6 As well as the possible effect on existing water related consents, the Hearing Panel must also consider the implications of the HDL applications for Solid Energy's mining operations as a whole over the life of its CML and MP, including consents that are likely to be required in the future to enable efficient extraction of the remaining coal resource and the avoidance, remediation and mitigation of adverse effects on the environment.
- 3.7 It is essential to Solid Energy's ongoing mining operations that it is not prevented from, or restricted in, obtaining consents over the life of the CML and the Upper Waimangaroa MP that enable it to continue to extract the coal resource in the most efficient and environmentally responsible manner.
- 3.8 The mining of the Stockton and Upper Waimangaroa parts of the Buller Coalfield requires detailed and incremental planning. It is not possible to comprehensively plan the entire development of coal resources in these areas at any given time. That is because logistical issues such as access requirements, water management and overburden placement depend on the work which has gone before.
- 3.9 Solid Energy is in a process of continuous and incremental planning and adapting as it progressively mines the coal resource and plans the mining of further coal resources. In this situation, it is not possible to determine precisely our operational needs (including water management) at any given point in advance. It is therefore crucial that Solid Energy retains as much flexibility as possible so that as mining

¹ *Arrigato Investments Ltd v Auckland Regional Council* [2002] 1NZR323 and *Sanford (South Island) Ltd v Southland Regional Council* C106/02

progresses it can design the most efficient operational methods. Any potential constraint on that flexibility risks increased costs, lower efficiency and ultimately an inability to recover coal resource.

- 3.10 Solid Energy's current application for water related resource consents to enable open cast mining within the Millerton block is an example of this. Mining of the Millerton block is important to Solid Energy's overall mining operations at Stockton. This area has been previously mined but considerable coal, estimated at around 10 million tonnes, remain. Mining in the Millerton block will enable production at Stockton to be maintained at or about current levels for the next 10 to 20 years.
- 3.11 While Solid Energy holds existing water rights for Millerton, they do not cover the full extent of the method of mining now proposed. Since those water rights were granted in 1989, Solid Energy has been able to develop an approach that will significantly improve the water quality of streams coming off this part of the Plateau. This improved approach requires additional water related resource consents.
- 3.12 The application for these consents has been the subject of extensive investigations and planning over the last 2 years and was lodged with the Regional Council in March 2009. Granting consent to HDL without making it subject to the Millerton consents (if granted) would undermine the Millerton project.
- 3.13 You are entitled to have regard to these issues. The conventional yard stick of "first come, first served" for determining the relative priority of competing applications² cannot be routinely applied in these circumstances to give the HDL applications automatic priority over any later Solid Energy applications.
- 3.14 It has been recognised by the Court of Appeal that the "first come, first served" principle is too simplistic and that particular factual situations may require a more nuanced approach.³

² As encapsulated in the Court of Appeal decision of *Fleetwing Farms Ltd v Marlborough District Council* [1997] 3NZR257.

³ *Central Plains Water Trust v Ngai Tahu Property Ltd* [2008] NZCA71

- 3.15 The Court of Appeal stated that there is an obvious public interest that the law should not frustrate a major and complex development that is in the process of obtaining the necessary approvals by allowing it to be trumped or significantly interfered with by later, smaller, simpler and inconsistent proposals that are able to be made comprehensively without needed to proceed in stages.⁴
- 3.16 The Court of Appeal said it "should prefer a policy that a complex scheme, which is reasonable presented in successive stages, should not be overridden by a simpler inconsistent scheme which, although presented as a comprehensive whole, is later in time. Any other decision would infringe fundamental policies of the RMA". This approach was considered by the Court of Appeal to support the overall sustainable management objective of the RMA.⁵
- 3.17 The purpose and principles of the RMA include best use. Therefore the Part 2 considerations do permit some consideration of foreseeable needs. Looking beyond HDL's application to foreseeable needs is required here by taking a merits based assessment. In looking at this issue, the law enables you to have regard to the social and economic benefits of the continued operation and development of the Stockton and Upper Waimangaroa coalfields (subject of course to Solid Energy obtaining the necessary resource consents) vis à vis the social and economic benefits of the HDL proposal and the risk that it may constrain or curtail future mining options.
- 3.18 Solid Energy's mining operations on Stockton Plateau and within the Upper Waimangaroa Mining Permit area are major and complex undertakings and by their very nature require successive applications for resource consents, as the nature of the mining operations and environmental considerations change. The Millerton application is illustrative of this. There should be no risk of Solid Energy's operations being significantly interfered with by a later proposal such as HDL's that is much smaller and does not need to proceed in stages.

⁴ *Central Plains Water Trust*, at para 59-60

⁵ *Central Plains Water Trust* at para 58

- 3.19 Consequently, unless a condition can be imposed to protect Solid Energy's mining operations over the life of the CML and MP (2028 and 2038 respectively), sustainable management of the natural and physical resources of the Stockton plateau and Upper Waimangaroa areas cannot be achieved. Solid Energy is in the middle of major projects involving extracting coal within the areas of its CML and MP. Sustainable management requires that it is able to continue these projects in the most efficient and environmentally responsible manner, and not be at risk of them being interfered with by the HDL scheme.
- 3.20 Moreover, Solid Energy's existing mining permits and water rights form a grant that should not be deliberately eroded by this Hearing Panel during its term by granting a permit to another person. This would be contrary to the principle of non-derogation.⁶ This principle supports Solid Energy's expectation that it will be able to fully utilise the coal resource over the life of the CML and MP in a manner that is consistent with the sustainable management requirements of the RMA.

4. RELIEF SOUGHT

- 4.1 Consents should only be granted to HDL if appropriate conditions can be imposed to ensure that its mining operations for the life of its CML and MP are not jeopardised. Such conditions would need to ensure that HDL's consents:
- a. Are contingent on it securing any necessary permissions from Solid Energy in respect of access to its land and infrastructure;
 - b. Will not derogate in any way from Solid Energy's existing mining and water related rights;
 - c. Will not be inconsistent with or operate to constrain or affect Solid Energy's Millerton resource consent application

⁶ *Aoraki Water Trust v Meridian Energy Ltd* CID 2003-476-000733.

- d. Will not interfere in any way with Solid Energy's future mining operations during the life of the CML and MP, including the grant of resource consents that are determined to meet the requirements of the Act.

4.2 In terms of the latter issues, the following condition would be acceptable to Solid Energy:

The consent holder has agreed that these consents are subordinate to:

- (a) any resource consents (including water and discharge permits) held by Solid Energy New Zealand Ltd for either its Stockton Mine (CML 37-150) or its Cypress Mine (41-515) at the date of the grant of these consents ("Existing Consents");
- (b) any variations to the Existing Consents;
- (c) and any other resource consents that Solid Energy New Zealand Ltd may apply for and be granted in respect of any mining operations within the Stockton Mine and/or any mining operations within its Upper Waimangaroa mining permit 41-515).
Mining operations shall not include any resource consent applications made by Solid Energy for any hydro schemes.

Subordinate shall mean that the resource consents held by Solid Energy or to be held by Solid Energy shall have priority over these consents such that these HDL consents may only be exercised or continued to be exercised to the extent that they are not inconsistent with any Solid Energy resource consents, and HDL expressly agrees that any effects of granting those water permits on the hydro scheme shall be disregarded by the consent authorities when considering any applications for resource consents or variations of resource consents by Solid Energy, and HDL shall, if requested by Solid Energy, provide a written approval under section 94 of the Resource Management Act to any such applications by Solid Energy.

Note:

Solid Energy has undertaken to HDL to give reasonable consideration to designing its future water management systems at the Stockton Mine and within the Upper Waimangaroa mining permit to the extent practicable (but without imposing any legal requirement on Solid Energy to expend any additional sums or to reduce its operational flexibility) to minimize impacts on the hydro scheme. If practicable Solid Energy will provide the opportunity to HDL to fund any additional works that may be necessary to reduce impacts on the hydro scheme.

4.3 On its face, this allows Solid Energy to derogate from HDL's consent so as to ensure that Solid Energy can continue carrying out its mining operations in the future.

- 4.4 If imposed by you on an unwilling applicant, a condition providing for the derogation of HDL's consent is likely to be unreasonable and unlawful. However, if such a condition were agreed to by HDL, the doctrine of *augier estoppel* applies and the condition is valid. This doctrine enables a consenting authority to impose a condition that may be ultra vires where the appellant has requested the condition be imposed⁷. In such a case, the applicant cannot later object to the enforcement of that condition on the basis that it is invalid.
- 4.5 HDL needs to specifically agree to any such condition for the doctrine of *augier estoppel* to apply. If you were to receive HDL's specific agreement to this condition, and their acknowledgement that it allows the consent to be derogated from in the future at Solid Energy's behest, the condition would remain valid and enforceable.

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Mark Christensen

Counsel for Solid Energy New Zealand Limited

4 August 2009

⁷ *Augier v Secretary of State for the Environment* (1978) 38 P & CR (QBD), applied in New Zealand in *Mora v Te Kohanga Reo Trust* [1996] NZRMA 556