

29 November 2012

Nicky Wagner  
Chairperson  
Local Government and Environment Select Committee  
c/o Parliament Buildings  
WELLINGTON

## **Resource Management (Restricted Duration of Certain Discharge and Coastal Permits) Amendment Bill**

BusinessNZ welcomes the opportunity to provide a submission to the Local Government and Environment Select Committee on the Resource Management (Restricted Duration of Certain Discharge and Coastal Permits) Amendment Bill.<sup>1</sup>

BusinessNZ does not support the amending Bill on the basis that it is ad hoc, and devoid of strategic or policy merit. Its passage beyond the Select Committee will, rather than create certainty, reduce it, and it is ultimately unnecessary to achieve its intended objectives.

### **Section 107**

As the Select Committee will be aware, section 107 currently restricts the ability of consent authorities to grant a discharge permit or a coastal permit that would result in contaminants entering water if, after reasonable mixing, it would result in certain adverse effects:

#### **“107 Restriction on grant of certain discharge permits**

...if, after reasonable mixing, the contaminant or water discharged (either by itself or in combination with the same, similar, or other contaminants or water), is likely to give rise to all or any of the following effects in the receiving waters:

- (c) The production of any conspicuous oil or grease films, scums or foams, or floatable or suspended materials:
- (d) Any conspicuous change in the colour or visual clarity:
- (e) Any emission of objectionable odour:
- (f) The rendering of fresh water unsuitable for consumption by farm animals:
- (g) Any significant adverse effects on aquatic life.”

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<sup>1</sup> Background information on BusinessNZ is attached to this letter as Appendix One.

Section 107 (2)(a) allows such permits to be granted in certain circumstances, one of these being “exceptional circumstances” as follows:

“(2) A consent authority may grant a discharge permit or a coastal permit to do something that would otherwise contravene section 15 or section 15A that may allow any of the effects described in subsection (1) if it is satisfied—

(a) that exceptional circumstances justify the granting of the permit...; or

...

and that it is consistent with the purpose of this Act to do so.”

The Bill seeks to limit the time period for a consent granted under "exceptional circumstances" in section 107(2) to a maximum of five years.

### **The Reasons Put Forward**

The rationale for the Bill is illuminating to the extent that it is almost completely without basis. The general policy statement to the Bill states that:

“The current law allows for virtually unlimited pollution of waterways because “exceptional circumstances” has not been defined or limited and consents may currently be issued for a period of up to 35 years. This has resulted in consents being granted for long-term pollution of waterways under a provision which was clearly not intended by Parliament to apply this way. As noted by the Environment Court (Decision No. A162/2003), exceptional circumstances “connotes something out of the ordinary”. Yet the current law has allowed permits for normal or regular discharges to be readily granted as “exceptional circumstances”. It effectively grants rights to pollute, which is contrary to the principles of sustainable management that guide the Resource Management Act.”<sup>2</sup>

However, in practice:

- the relevant case law has carefully defined what “exceptional circumstances” are (commencing with *Paokahu Trust v Gisborne District Council* (2003), and when they might arise (to be determined on the circumstances of each case);
- the granting of exceptional circumstances can only be done where it is consistent with the purposes of the Act to do so. To state that section 107(2) has been applied in a way “clearly not intended by Parliament” is to criticise the judiciary, and not the law;
- BusinessNZ is aware of only a handful of instances in which the section has been invoked; and
- the determination of exceptional circumstances does not imply an automatic or unlimited right to pollute. The Tasman Mill discharge consent is a case in point where despite Tasman’s pursuit of a thirty-five year consent period, it was only granted a twenty-five year

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<sup>2</sup> Explanatory note to the Bill, page 1.

consent term, based on the case-specific facts. The consent was also subject to a set of extremely rigorous, and challenging conditions.

In BusinessNZ's view, section 107(2) appears to strike an appropriate balance between providing a reasonable and legitimate safety-valve for projects that are in practice truly exceptional given a close analysis of the particular circumstances, the operational interests of the businesses and the need to protect the environment.

### **A Barrier to Doing Business**

The proposed amendment would create an insurmountable barrier to doing business. Key to this is that organisations would either face severe operational difficulties should they be unable to rely on the section or it would have a chilling effect on new investment. For example, in *Paokahu Trust vs Gisborne District Council*, 2003, it was found that the Council would face insurmountable difficulties if it were unable to dispose of its sewerage. BusinessNZ also understands that if this section is in place at the time of consent renewal for Tasman Mill, a five year consent length would lead to its eventual closure.

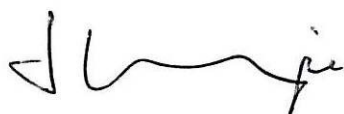
In terms of a chilling effect on new investment, no business who plans to invest in costly and long-lived assets that rely on a case to be made for exceptional circumstances are likely to invest in such plant and equipment if they can only secure a five year consent period.

No information accompanies the proposal to enable an assessment to be made of the impact of the proposed amendment on relative costs and benefits but it is likely that this regulatory proposal would not produce a positive net public benefit.

### **Summary**

This Bill is ill-considered and without merit. It is unlikely to achieve its stated purpose while at the same time causing substantial uncertainty, both operational and investment, for those who face legitimate uniquely exceptional circumstances. It is BusinessNZ's view that such matters – if they merit consideration at all - should not be addressed on an ad hoc or piecemeal basis, but only in the context of a wider reassessment of the overall framework of resource management.

Yours sincerely



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## **APPENDIX ONE: ABOUT BUSINESSNZ**

Encompassing four regional business organisations (Employers' & Manufacturers' Association (Northern), Business Central, Canterbury Employers' Chamber of Commerce, and the Otago-Southland Employers' Association), BusinessNZ is New Zealand's largest business advocacy body. Together with its 80 strong Major Companies Group, and the 70-member Affiliated Industries Group (AIG), which comprises most of New Zealand's national industry associations, BusinessNZ is able to tap into the views of over 76,000 employers and businesses, ranging from the smallest to the largest and reflecting the make-up of the New Zealand economy.

In addition to advocacy on behalf of enterprise, BusinessNZ contributes to Governmental and tripartite working parties and international bodies including the ILO, the International Organisation of Employers and the Business and Industry Advisory Council to the OECD.

BusinessNZ's key goal is the implementation of policies that would see New Zealand retain a first world national income and regain a place in the top ten of the OECD (a high comparative OECD growth ranking is the most robust indicator of a country's ability to deliver quality health, education, superannuation and other social services). It is widely acknowledged that consistent, sustainable growth well in excess of 4% per capita per year would be required to achieve this goal in the medium term.