

Tabled at Hearing 11/03/2013

IN THE MATTER of the Resource Management Act
1991

AND

IN THE MATTER of the Proposed Canterbury Land
and Water Regional Plan

**SUBMISSIONS OF COUNSEL FOR FONTERRA CO-OPERATIVE GROUP LIMITED
AND DAIRYNZ FOR THE GROUP 1 HEARING**

1. INTRODUCTION

- 1.1 My submissions respond to legal questions arising from the submitters' evidence and précis the evidence addressing some of Fonterra and DairyNZ's chief concerns.

2. OBJECTIVES

- 2.1 Section 67(1) of the Resource Management Act requires that a regional plan state objectives for the region. Those objectives must be implemented by policies and those policies in turn may be implemented by rules.
- 2.2 The Proposed Canterbury Land and Water Regional Plan contains objectives, policies and rules. However, in my submission the linkages between those different tiers of the Regional Plan are not as strong as they could be. Mr Willis' evidence in chief identifies several unstated objectives that the policy and rule framework are working towards. These relate to:
- (a) Recognition of existing investment;
 - (b) Recognition that social and economic well-being is dependent on the continuation of water takes and discharges;
 - (c) Utilisation of the assimilative capacity of water;

- (d) The importance of agriculture; and
- (e) The importance of efficient resource usage.

2.3 Alignment between the Plan’s objectives, policies and methods is a requirement of section 32(3)(b) of the Act:

“32 Consideration of alternatives, benefits, and costs

(3) An evaluation must examine—

...

(b) *whether, having regard to their efficiency and effectiveness, the policies, rules, or other methods are the most appropriate for achieving the objectives.”*

2.4 Alignment between the objectives, policies and rules of the Plan comes to the fore particularly when applications for resource consents are assessed against those provisions. Where relevant objectives are missing, there is a danger that such assessments will be biased towards only the objectives that have been properly articulated.

2.5 It is Mr Willis’ evidence that inclusion of the objectives that he suggests to better correlate the Plan’s objectives, policies and rules would also better give effect to the Canterbury Regional Policy Statement, another statutory requirement under s 67(3) of the Resource Management Act.

2.6 Mr Ryan’s evidence describes the number of small businesses (dairy farms) regulated by the Plan.¹ Mr Goldschmidt’s evidence describes the significant value of dairy processing.² Mr Butcher’s evidence provides quantification of the major economic contribution of dairying to the Region’s economy.³ In my submission the weight of this evidence establishes the necessity that the Plan not overlook the important contributions of the dairy sector to the Region and nation. Mr Willis’ evidence sets out his planning recommendations to achieve that end.

1. Ryan, evidence in chief, paras 4.2-4.7.
 2. Goldschmidt, paras 4.1-4.7.
 3. Butcher, paras 3.1-3.9.

3. POLICY 4.1 AND TABLES 1(a), (b) AND (c)

Section 5 of the Resource Management Act 1991

3.1 In the context of discussing Policy 4.1 and its accompanying tables Mr Percy (for Fish & Game) has described subsections 2(a) – (c) of s 5 as “*baselines*” that must be met at all times and in all circumstances. This interpretation also underpins Mr Death’s evidence.⁴ Mr Percy has suggested that subsection (2)’s references to enabling communities to provide for their social, economic and cultural wellbeing are and must always be subordinate to the achievement of the aims set out in paragraphs (a) – (c).⁵ In my submission the Courts have not agreed with or applied the interpretation advanced by Fish & Game’s witnesses, and for good reasons.

3.2 Section 5 states:

“5 Purpose

(1) *The purpose of this Act is to promote the sustainable management of natural and physical resources.*

(2) *In this Act, sustainable management means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well-being and for their health and safety while—*

4. For example: Percy rebuttal evidence, paras 21 and 26; the same premise is inherent in the “two-step” approach advocated by Death rebuttal evidence, para 9; also Death rebuttal evidence, paras 5 and 6 (emphasis added):

“Mr Willis focuses on net changes across the region; as such he fails to take into account essentially the purpose of establishing freshwater quality limits in the first place; to protect values in individual rivers. The establishment of limits should be determined by the in-stream values one is trying to manage for so that they are appropriate for that waterbody and not too high, or too low.”

5 Percy, rebuttal, para 21 (emphasis added):

*“Opportunity costs of not providing for dairy conversions in order to meet the baseline requirements of safe-guarding life supporting capacity, ecosystems and indigenous biodiversity **should not be a factor**, as the RMA is clear that those core values are to be provided for.”*

Also para 26 (emphasis added):

*“While I largely agree ... insofar as environmental outcomes need to acknowledge the use people wish to put fresh water to, there are some fundamental bottom lines that must be provided for in all situations. Those are set out in Objective A1 of the NPSFW and also in s5 (2) of the RMA. Beyond those baseline requirements, the freshwater objectives should represent the outcomes the community desires for different water bodies ... My understanding of the RMA and the NPSFW is that economic effects **do not influence** the need to provide for the fundamental bottom line.”*

- (a) *sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and*
- (b) *safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and*
- (c) *avoiding, remedying, or mitigating any adverse effects of activities on the environment.”*

3.3 The way in which the word “while” is used in subsection (2) is important. The Environment Court’s discussion in *Winstone Aggregates Ltd v Papakura District Council* provides a useful starting point:⁶

[15] *Section 5 sets out the purpose and principles of the Act, which is to promote the sustainable management of natural and physical resources. Section 5 is accorded primacy and has been described as the “lodestar”. Thus, section 5 guides the functions of regional and territorial authorities in plan-making and policy decisions, and, when territorial authorities are making decisions as to whether to grant or refuse resource consent applications.*

[16] *There has been some debate about the ambiguous meaning of the word “while” within the context of s5(2), and whether it is used conservatively or loosely. In other words, whether “while” is used as a subordinating conjunction, or a coordinating conjunction.*

[17] *If “while” is used as a subordinating conjunction meaning “if”, or “as long as” then sustainable management can only occur if the matters in subsections (a) (b) and (c) are secured.*

[18] *If “while” is used as a co-ordinating conjunction meaning “at the same time as”, then sustainable management can occur if the matters in subsections (a), (b) and (c) have equal value to, and therefore in any decision-making process are afforded the same weight as, the matters set out in the words preceding “while” and prefaced by the word “managing”.*

[19] *In Peninsula Watchdog Group Inc v Waikato District Council, the Tribunal was invited to form an opinion on the word “while”. Counsel in that case submitted that the correct interpretation to be given to the word “while” in s5(2) was that human values are conditional upon ecological values. The Tribunal declined to address the meaning of the word “while” in s 5(2) and adopted the reasoning of Grieg J in NZ Rail v Marlborough District Council. The Tribunal was of the view that the case should be decided on the basis of submissions, and the evidence before it, rather than on an academic analysis of s5.*

6 Environment Court, A49/02, paras 15-22.

[20] In the NZ Rail case, Greig J held that:

“This Part of the Act expresses in ordinary words of wide meaning the overall purpose and principles of the Act. It is not, I think, a part of the Act which should be subjected to strict rules and principles of statutory construction which aim to extract a precise and unique meaning from, the words used. There is a deliberate openness about the language, its meanings and its connotations which I think is intended to allow the application of policy in a general and broad way.”

[21] In North Shore City Council v Auckland Regional Council, the Environment Court in the application of s5, adopted the reasoning in Trio Holdings Ltd v Marlborough District Council, and held that:

“The method of applying section 5 then involves an overall broad judgment of whether a proposal would promote the sustainable management of natural and physical resources. That recognises that the Act has a single purpose. Such a judgment allows for comparison of conflicting considerations and the scale or degree of them, and their relative significance or proportion in the final outcome.”

[22] The application of section 5(2)(c) cannot fulfil the overall purpose of sustainable management, if the section is interpreted in such a way as to give primacy to the ecological values over the management function. To do that would not always fulfil the purpose of sustainable management, but may in some cases. What is required is a consideration of all aspects of the case, and then a weighing of factors in order to evaluate which will best achieve the purpose and principles of the Act.”

3.4 Mr Percy has treated “safeguarding the life-supporting capacity of air, water, soil, and ecosystems” under section 5(2)(b) as a baseline that cannot be crossed in relation to any waterway at any time. This approach cannot be correct. For example, when greenfield areas are urbanised it is not uncommon for streams to be removed altogether or piped. The life supporting capacity of those streams is completely or largely eliminated in order to provide an urban area in which people may live. Or to take another example, when a river is dammed for hydro generation, serious effects on that particular river are countenanced in order to provide renewable electricity for people’s use. In my submission section 5 must be and has consistently been given a broader and more general interpretation than Fish and Game contends.

3.5 In my submission section 5(2)(b) informs the broad judgment required when determining what will best promote sustainable management, but does not dictate that other factors may not weigh more heavily in particular instances.

My submission is supported by the Environment Court's decision in *North Shore City Council v Auckland Regional Council*:⁷

"Where ... there are a number of issues to be considered in deciding whether a proposal would promote the sustainable management of natural and physical resources as defined, it is our understanding that the duty entrusted to those making decisions under the Act cannot be performed by simply deciding that on a single issue one or more of the goals in paras (a), (b) and (c) is not attained.

...

We have considered ... the method to be used in applying s 5 to a case where on some issues a proposal is found to promote one or more of the aspects of sustainable management, and on others is found not to attain, or to attain fully, one or more of the aspects described in paras (a), (b) or (c). To conclude that the latter necessarily overrides the former, with no judgment of scale or proportion, would be to subject s 5(2) to the strict rules and principles of statutory construction which are not applicable to the broad description of the statutory purpose. To do so would not allow for exercise of the kind of judgment by decision-makers ... alluded to in the NZ Rail case."

- 3.6 By contrast, the hard "baseline" approach to section 5(2)(b) advocated by Mr Percy and Mr Death would lead the Committee to conclude that section 5(2)(b) overrides the enabling and managing aspects of section 5 without any scope for consideration of the scale and proportion of the consequences.
- 3.7 It is my submission that contrary to the stance taken by Mr Percy and Mr Death, section 5 can allow a lowering of ecological values in waterways, if that results in better overall sustainable management as defined by the Act.
- 3.8 In *Waimakariri Employment Park Limited v Waimakariri District Council* the Environment Court observed:⁸

"Although it has been suggested in some circumstances that sections 5(2)(a), (b) and (c) represent a triple bottom line to sustainable management, an examination of the subsections in question indicates that in each case value judgments are necessary in order to conclude how the section applies."

- 3.9 In my submission it is wrong to narrowly interpret sections 5(2)(a), (b) and (c) as applying to purely biological or ecological concerns. The "life-supporting capacity" of water in section 5(2)(b) certainly includes consideration of ecological functioning and the like, but could also include the potential for water

7. [1997] NZRMA 59, 93.

8. Environment Court, C66/03, para 155.

to sustain people and communities. The “*environment*” upon which adverse effects are to avoided, remedied or mitigated under section 5(2)(c) includes more than ecological values. The Act defines the environment in section 2:

“environment includes—

- (a) ecosystems and their constituent parts, including people and communities; and*
- (b) all natural and physical resources; and*
- (c) amenity values; and*
- (d) the social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c) or which are affected by those matters.’*

- 3.10 Thus even if a “baseline” approach to sections 5(2)(a)-(c) were accepted, upon closer examination those subsections do not support the purely ecological focus of the Fish and Game witnesses. Adverse effects on social and economic conditions are also to be avoided, remedied or mitigated.
- 3.11 Policy 4.1 and its accompanying tables should not impose immutable standards set to ensure complete environmental protection at all times, in all places. Leaving aside the question of what level of protection would satisfy such an aim, such a rigid approach would not fulfil the purpose of the Act. Within the context of achieving overall improvement of water quality as required by the National Policy Statement for Freshwater Management, scope needs to be preserved to secure social, economic and cultural benefits of resource use, even, in appropriate circumstances, where those benefits come at some ecological cost. Fonterra and DairyNZ do not contend the inverse of Mr Percy’s proposition: that social, economic and cultural concerns should always trump ecological values. Fonterra and DairyNZ say that where both outcomes cannot be achieved, that room should be left for social, economic and cultural wellbeing to weigh in the overall broad evaluation made under s 5 of the Act, even to the extent that those concerns might be secured while some compromise of ecological values occurred.
- 3.12 A consequence of this approach is that the Plan’s intended structure, whereby sub-regional chapters may set catchment-specific environmental limits based upon the particular circumstances of the catchment, should not be undone.

That process will allow for the establishment of limits that reflect the community's view as to the appropriate outcome having weighed all of the relevant matters in forming an overall judgment in terms of s 5 of the Resource Management Act.

Values of Fresh Water Bodies

- 3.13 There is little or no disagreement between the evidence of Mr Willis and that of Mr Percy, Mr Death and others that fresh water bodies should be managed with reference to their particular values. However, the Fish and Game witnesses generally take a purely ecological and recreational view of what those values might be. For instance, Appendix 6 to Mr Percy's evidence in chief lists the "*critical values*" of various water quality classes. Only five "*critical values*" are identified: high/moderate biodiversity, salmonid fishery, salmonid spawning, amenity and contact recreation.
- 3.14 In a similar vein, Mr Death's rebuttal evidence provides a telling example of a micro focus leading to a macro judgment. Mr Death's position is that the (ecologically defined) life-supporting capacity of every freshwater body must be safeguarded, which in his view means that the criteria in Tables 1(a), (b) and (c) must be met at minimum. He then reasons that where any waterbody does not currently meet those criteria it is degraded and concludes that waterbodies should be managed to address that degradation.⁹ Mr Death's single focus on the ecological management of freshwater bodies never once allows for the consideration of other values in reaching his conclusion.
- 3.15 In my submission Mr Percy and Mr Death's narrow focus is not supported by reference to section 5 of the Act nor by reference to the Act's definition of "environment". It would therefore be inappropriate to skew the Regional Plan towards ecological and recreational values in the manner advocated by some of the Fish and Game witnesses. By contrast the preamble¹⁰ to the National Policy Statement for Freshwater Management identifies a range of both "use" and "intrinsic" values, an approach that I submit is much more consistent with

9 Death, Rebuttal, para 20.

10 Note that the preamble states "This preamble may assist the interpretation of the national policy statement."

section 5 of the Act and the Act's broad definition of "environment" and better reflects the Canterbury Water Management Strategy.

Tables 1(a), 1(b) and 1(c)

- 3.16 Ms Hayward's evidence explains the genesis of Tables 1(a), (b) and (c). In my submission it is compelling that the author of the Table, as it appears in the Natural Resources Regional Plan, does not support the reuse of the Table in the way proposed.¹¹ Ms Hayward's evidence indicates that the Table is not appropriate to provide immediate water quality standards for every waterbody in the Region.¹²

Community and Stakeholder Collaboration

- 3.17 The Canterbury Water Management Strategy states its preference for a collaborative governance model in relation to water management. It envisages community and stakeholder engagement in setting environmental limits and land use controls in catchments throughout the Region.¹³ Zone Committees and Zone Implementation Plans play a key role.
- 3.18 Fish and Game's evidence contends that the criteria in Tables 1(a), (b) and (c) should apply as minimum standards to all water bodies in the Region, forbidding the sub-regional chapters from setting any lesser limits for any particular water bodies. Mr Percy and Mr Deans state that the criteria in Tables 1(a), (b) and (c) are based on community and stakeholder collaboration because they emerged as part of the Natural Resources Regional Plan.¹⁴ In my submission this proposition cannot be accepted for several reasons. As Ms Hayward's evidence records, the values in Tables 1(a), (b) and (c) were not used by the Natural Resources Regional Plan for the same purpose as they are in the Land and Water Regional Plan. Acceptance of general water quality aspirations for water body classes does not equate to acceptance of uniform minimum standards for all water bodies. Further, the approach advocated by Mr Percy and Mr Deans would preempt the role of the Zone Committees and Zone Implementation Plans, defeating the collaborative governance model.

11. Hayward, para 3.16.

12. Hayward, para 3.18.

13. Willis, evidence in chief, para 7.2.

14. Percy, rebuttal, paras 27-28; Deans, rebuttal, para 9.

- 3.19 In my submission the Regional Council's proposed approach, allowing the sub-regional chapters freedom to set appropriate freshwater outcomes, limits and resource management practices at a catchment level is far more consistent with the Canterbury Water Management Strategy, with the National Policy Statement for Freshwater Management, and with the promotion of sustainable management.¹⁵ Indeed, it seems the epitome of sustainable management to craft solutions at a scale that enables a response tailored to catchment-specific ecological, social, cultural and economic imperatives that are inevitably unique.
- 3.20 The evidence of the two Ngai Tahu submitters also seeks to change the way the Plan functions in terms of the inter-relationship between the default Regional Plan provisions and the sub-regional sections. The Ngai Tahu submitters put forward the proposition that the objectives and policies should remain constant, with the scope of the sub-regional sections confined to implementation of allocation regimes and other water quality and quantity limits.¹⁶ If adopted, this would mean that either the objectives and policies would be so broad as to add almost nothing to the resource management higher-order imperatives guiding rule development throughout the Region or alternatively those objectives and policies would inevitably limit the range of outcomes that communities were able to select for themselves as appropriate within those sub-regions.

15. Although it is of limited value in a hearing of this nature I note the National Policy Statement for Freshwater Management 2011: Implementation Guide. Wellington: Ministry for the Environment agrees with this position, providing the following as commentary to Policy A1:

"The setting of regional objectives, and hence limits, must be made in the context of environmental, social, cultural and economic values. Councils are expected to engage with their communities, including iwi, about the way their waterbodies are valued to set freshwater objectives and translate those objectives into limits, environmental flows or levels in their regional plans.

Freshwater objectives should be set at a variety of scales and levels of detail. Broad narrative objectives for the region may be set in a regional policy statement. More detailed narrative objectives for a region and/or an individual catchment can be set in regional plans as objectives and policies. Detailed freshwater objectives can be numeric (eg, a desired concentration of a contaminant, or a measure of a marker species) and can be set as policies in regional plans. A narrative objective may outline an acceptable amount of change, an outcome or parameters sought, without containing numeric values. A detailed objective may relate to a part of a waterbody or catchment."

16. Evidence of Sandra McIntyre, para 3.6.

- 3.21 It is my submission for the reasons set out here and in the rebuttal evidence of Mr Willis¹⁷ that such an approach is inappropriate and does not achieve the sustainable management of natural and physical resources. The approach presently adopted by the Plan, whereby the objectives in section 3 and the policies in section 4 apply across the Region, except to the extent that more specific policies in the sub-regional chapters give more relevant or specific guidance, should remain.
- 3.22 In addition, such an approach raises issues of natural justice. The Plan was notified on the basis that further, specific sub-regional plans would be prepared and would offer people and communities the opportunity to comment on the outcomes, policies, rules and allocation limits considered appropriate for those catchments. If that opportunity were now to be removed it raises the prospect that submitters, who have relied on such an opportunity, find themselves having to accept the broader Regional Plan objectives and policies, provisions that they were content enough with at the broad level, but did not envisage applying over the long term to their own specific situation.

4. CONSENT DURATION

- 4.1 Policy 4.76 states that resource consents for the use of land for farming activities and for water use and take in over-allocated catchments will generally be subject to a five year duration. The activities to which this policy applies would have non-complying activity status.¹⁸
- 4.2 If consent has been granted to them, those activities will have passed through at least one of the alternate gateways for non-complying activities in s 104D of the Resource Management Act. Given the very stringent policy framework discouraging the grant of such applications it is likely that the application will have demonstrated itself to have no more than minor adverse effects on the environment. Either way, it is not clear what benefit is obtained by attempting to limit the Council's discretion to assess and consider an appropriate consent duration for that activity. In the case of conversions to dairy farming at least, such applications are likely to involve substantial capital investment.

17. Paragraphs 2.5 – 2.11.

18. Rule 5.45 (otherwise land use change in the red zone is a permitted activity under Rule 5.42), Rule 5.97 and Rule 5.103.

- 4.3 The proposed policy is counter to existing case law, which suggests that in a situation where it is appropriate to grant consent, matters such as the size of the capital investment are relevant and should generally lead to the granting of consents for a term longer than that proposed in this policy.¹⁹

5. PRO RATA CUTBACKS DURING WATER SHORTAGES

- 5.1 Fonterra's concerns in relation to pro rata cutbacks during water shortages centre on the water used by its dairy processing plants. Mr Willis highlights the inequity between industrial uses connected to group or community supply water and those not so connected, with the former being exempt from water shortage cutbacks.²⁰ Mr Butcher's evidence explains that the economic value of water for processing far exceeds alternative uses, therefore a pro rata cutback is not economically rational.²¹ Further, as Mr Goldschmidt explains, processing shutdowns would reduce the processing plant's water efficiency and could lead to milk being dumped.²² Mr Willis' evidence in chief contains amendments to Policy 4.61(c) to allow for a more sustainable, activity-specific approach to cutbacks during water shortages.

6. TRANSFER OF WATER PERMITS

- 6.1 Policy 4.73 establishes that a percentage of water takes must be surrendered when a permit is transferred. Mr Butcher's evidence in chief explains how this may undermine allocative and dynamic efficiency.²³ Mr Willis notes that Fonterra's Darfield processing site was purchased with a water permit allowing a take in excess of the plant's current needs, but it now could not temporarily transfer these rights until needed without forfeiting a percentage of the water permit for which it has already paid.²⁴ Sale of the plant would also necessitate a forfeiture, and this loss upon sale reduces the value of the asset for which Fonterra paid, and many others will be placed in a similar position. Mr Willis'

19 *PVL Proteins Ltd v Auckland Regional Council*, Environment Court, A61/01, para 30: "Uncertainty for an applicant of a short term, and an applicant's need (to protect investment) for as much security as is consistent with sustainable management, indicate a longer term."

20. Willis, evidence in chief, paras 10.31-10.32.

21. Butcher, para 8.7.

22. Goldschmidt, paras 7.3 and 7.6.

23. Butcher, para 5.2.

24. Willis, evidence in chief, para 10.48.

opinion is that the Policy is inefficient and preempts the role of the sub-regional chapters of the Plan.²⁵

7. CONCLUSION

7.1 Fonterra and DairyNZ call the following evidence:

- (a) Mr Mat Cullen;
- (b) Mr James Ryan (evidence in chief and supplementary evidence);
- (c) Mr Ian Goldschmidt;
- (d) Mr Geoff Butcher;
- (e) Ms Shirley Hayward (evidence in chief and rebuttal); and
- (f) Mr Gerard Willis (evidence in chief and rebuttal).

7.2 Fonterra and DairyNZ also adopt the evidence of Mr Peter Callander for Irrigation New Zealand, Federated Farmers of New Zealand and Horticulture New Zealand.

7.3 The precise relief sought by Fonterra and DairyNZ can be found in the evidence of Mr Willis.

25 Willis, evidence in chief, paras 10.50-10.51.