

**IN THE MATTER** of the Resource Management Act 1991

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**IN THE MATTER** of submissions and further submissions by Rangitata Diversion Race Management Limited (**RDRML**) on the proposed Canterbury Land & Water Regional Plan (**LWRP**)

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**SUPPLEMENTARY LEGAL SUBMISSIONS (HEARING 1) ON BEHALF OF RDRML**

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**Introduction**

1. These supplementary legal submissions are filed further to the presentation of RDRML's Hearing 1 submissions on 14 March 2013. They address the following issues which arose in the course of RDRML's presentation:
  - (a) The definition of "*community water supply*";
  - (b) The definition of "*maintenance*"; and
  - (c) Whether the Resource Management Act 1991 (**RMA**) allows for a regional plan to provide for an activity requiring a water permit as a controlled activity.

**Community Water Supply**

2. As discussed on 14 March 2013, RDRML is concerned that the new definition of "*community water supply*" recommended by the reporting officers is too broad, particularly as it includes institutional, industrial, and processing, and as Rule 5.88 of the LWRP is not subject to compliance with the sub-regional sections 6-15 of the LWRP.<sup>1</sup> In this regard, a particular concern is the potential for new activities to result in adverse effects on the environmental flow and allocation limits within sections 6-15 of the LWRP and existing users taking water pursuant to resource consents within those catchments.

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<sup>1</sup> This is against the background of the first and second order priorities in the Vision and Principles of the Canterbury Water Management Strategy, included within Schedule 1 to the Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010, and the references to "*community drinking water*" within Issue 7.1.3 and Policy 7.3.4 of the Canterbury Regional Policy Statement 2013.

3. In general terms, the options for addressing the concerns expressed include amendments to:

- (a) The definition of "*community water supply*";
- (b) Rule 5.88;
- (c) The sub-regional sections 6-15 of the LWRP to make it clear that they override 5.88 (this is contemplated by Note 1 to rule 5.88, but it is not clear how this override operates).

4. It is submitted that the most appropriate way to address the concerns, having regard to the matters previously discussed<sup>2</sup> and the practicalities of reticulated water supply, is a combination of amendments as follows:

- (a) Amend the definition of "*community water supply*" recommended by the reporting officers as follows:

*Community water supply means a reticulated water supply taken primarily for ~~group drinking water supply~~ and includes ~~group drinking water supply~~, and community drinking water supply, but that may also be used for other purposes such as supply to institutional, industrial, processing, stockwater, or amenity irrigation use and firefighting.*

(Provided "*group drinking water supply*" is retained in rule 5.88, there is no need to include it within the definition of "*community water supply*").

- (b) Amend rule 5.88 as follows:

***The taking and using of water for a group or community water supply from groundwater or surface water is a restricted discretionary activity provided the following condition is complied with:***

1. *There is an operative Water Supply Strategy.*
2. *Where the application seeks water for purposes which are not related to community drinking water, the application clearly identifies which components are not related to community drinking water, and which of those are existing or new activities.*

***The CRC will restrict discretion to the following matters:***

1. *The reasonable demand for water, taking into account the size of the community or group, the number of properties and stock that are to be supplied, the uses that are to be supplied and the potential growth in demand for water;*

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<sup>2</sup> Refer footnote 1.

2. *The effectiveness and efficiency of the distribution network;*
3. *The adequacy of the Water Supply Strategy;*
4. *The effect on other water takes, including reliability of supply;*
- 4A. *The effect on the environmental flow and allocation limits within the relevant sub-regional Sections 6-15.*
5. *Any beneficial effects from the use of the water; and*
6. *Compliance with any relevant Water Conservation Order.*
7. *The extent to which the proposed activity is inconsistent with, the Strategic Policies of this Plan.*

- (c) Amend the sub-regional sections to be more explicit about when Note 1 to rule 5.88 applies. In the case of Section 13, which most directly affects RDRML, the following is suggested as an amendment to Section 13.5 Rules:

*Note 1: For the avoidance of doubt, all applications in the Ashburton Sub-regional area are subject to the rules of this section.*

## **Maintenance**

5. In relation to the definition of "*maintenance*" recommended by the reporting officers, Commissioner van Voorthuysen asked Mr Bryce a series of questions regarding section 6.0 of his evidence particularly as it related to the recommendation to included permitted activity conditions.
6. I submitted that whilst Mr Bryce's concern appeared to be understood, the confusion appeared to arise because the constraint on upgrades was included both in the definition of "*maintenance*" recommended by the reporting officer, and in the permitted activity conditions proposed by Mr Bryce.<sup>3</sup> I suggested two solutions. Those solutions are:
  - (a) Confine the definition of "*maintenance*" recommended by the reporting officers so that it applies to permitted activity rules only:

*Means, for the purpose of permitted activity rules, repairing and keeping a structure, and or vegetation in good and safe condition and includes upgrading and minor alterations as long as any upgrading or minor alteration does not increase the footprint, height, or external envelope of the structure.*

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<sup>3</sup> Paragraph 6.9 of the Statement of Evidence of Nigel Roland Bryce dated 4 February 2013 sets out the permitted activity rules to which this applies.

- (b) Remove the constraint on 'upgrading' from the definition of "maintenance", and include it *instead* as a condition on permitted activity rules (as Mr Bryce proposed):

*Means repairing and keeping a structure, and or vegetation in good and safe condition and includes upgrading and minor alterations ~~as long as any upgrading or minor alteration does not increase the footprint, height, or external envelope of the structure.~~*

7. These solutions would avoid the concern of Mr Bryce that the definition of "maintenance", when used within rules that do not provide for permitted activities, might unnecessarily constrain the activities to which those rules apply. The principal example of this is rule 5.132, in relation to which the reporting officers recommend the addition of the word 'maintenance'.

### **Water Permits – Controlled Activities**

8. RDRML notes the Memorandum of Counsel filed on behalf of TrustPower Limited dated 19 March 2013 (the **TrustPower Memorandum**), in respect of controlled activities for water permits. This relates to an issue that was also raised in questions of RDRML's witness Mr Bryce.
9. RDRML does not seek to repeat its evidence, nor the points contained within the TrustPower Memorandum, which RDRML agrees with.
10. However, Commissioner Sheppard questioned whether the Environment Court had settled the controlled activity rules referred to in Mr Bryce's evidence,<sup>4</sup> and it is relevant to bring to the Commissioners' attention the provisions of Variation 6 (Water Allocation) to the Waikato Regional Plan, which were determined following an Environment Court hearing in *Carter Holt Harvey Limited v Waikato Regional Council* [2011] NZEnvC 380.
11. The Variation 6 provisions contained controlled activities relating largely, although not exclusively, to existing activities. Examples, set out in Appendix Two to that decision, include:
- (a) Taking of Surface Water for Cooling Water for the Huntly Power Station;
  - (b) Existing Taking of Surface Water for Domestic or Municipal Water Supply;

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<sup>4</sup> Paragraphs 7.45 and 7.46.

- (c) Taking of Surface Water for Existing Milk Cooling and Dairy Shed Wash Down; and
- (d) Taking of Groundwater for Existing Milk Cooling and Dairy Shed Wash Down.

(For completeness, it is noted that while there are also controlled activity rules within the Waikato Regional Plan for existing lawfully established damming and diversion activities<sup>5</sup>, these sit within a different section of the Waikato Regional Plan and were not part of Variation 6 or subject to that decision).

12. The other context in which the merits of controlled activity status appears to have been considered, in determining rules for existing activities for which permits may only be granted for a limited term, is marine farming (*Golden Bay Marine Farmers v Tasman District Council* (W42/2001); *Auckland Yacht and Boating Association (Inc) v Waikato Regional Council* [2003] NZRMA 161). However, those cases focussed on whether controlled activity status was *appropriate*, as distinct from whether the classification of applications for such permits as controlled activities was *permissible* under the RMA.
13. Given that the above cases have considered the merits of controlled activity status for existing activities for which permits may only be granted for a limited term, and for the reasons set out in the TrustPower Memorandum, it is submitted that the RMA does not preclude the classification of applications for water permits as a controlled activity.

**DATED at TAURANGA** this 22<sup>nd</sup> day of March 2013



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**Vanessa Jane Hamm**

(Counsel for Rangitata Diversion Race Management Limited)

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<sup>5</sup> Section 3.6, rules 3.6.4.10 and 3.6.4.11.