BEFORE THE INDEPENDENT COMMISSIONERS

UNDER	the Resource Management Act 1991
AND	
IN THE MATTER	of the proposed Canterbury Land and Water Regional Plan

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SUPPLEMENTARY LEGAL SUBMISSIONS ON BEHALF OF THE ENVIRONMENTAL DEFENCE SOCIETY INCORPORATED

23 April 2013

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1 Maree Baker-Galloway appeared on 9 April 2013 as agent to present legal submissions prepared by the Environmental Defence Society Incorporated (EDS). A number of questions raised by the Commissioners have been referred back to EDS for a formal response.

2 Paragraph 35. The chairman David Sheppard queried whether there really would be a "hodgepodge of provisions which are not consistent or integrated" given that as each subsequent plan change goes through the First Schedule process the council will be able to itself ensure an outcome that is integrated.

2.1 Ms Baker-Galloway responded on 9 April 2013 that in the plan as notified there is no firm policy direction that would require the desirable level of integration and consistency between the sub-regional chapters. EDS would like to add that each subsequent plan change can only be considered in light of those that have gone before. There will be at no time an opportunity to consider all of the sections of the plan as a whole and assess their merit in this light.

3 Paragraph 39. The chairman noted that advice on the Quality Planning website is not law.

3.1 EDS agrees that the extracts from the Quality Planning website referred to in EDS's submission are not derived from an authoritative legal source. The Quality Planning website is a partnership between the New Zealand Planning Institute, the Resource Management Law Association, Local Government New Zealand, the New Zealand Institute of Surveyors and the Ministry for the Environment. It was launched in 2001 to promote good practice by sharing knowledge about all aspects of practice under the RMA.[1] It was referred to by EDS as it is considered to set out what is generally accepted as good planning practice in New Zealand.

4 Paragraph 41. In respect of EDS's concerns on use of terms such as "generally" the chairman referred EDS to the Waikato regional policy statement decision where the Environment Court said that use of terms such as "generally" was acceptable.

4.1 *Carter Holt Harvey Ltd v Waikato Regional Council* [2011] NZEnvC 380, which concerned Proposed Variation 6 to the Waikato Regional Plan, addressed policies containing the word "generally":[2]

[1] http://www.qualityplanning.org.nz/index.php/about-quality-planning

[2] The following policies are extracted from the operative version of Variation 6 to the Waikato Regional Plan. The numbering of the policies differed in the decisions version of proposed Variation 6 to the Waikato Regional Plan.

Policy 13: Non-Complying Activities within the Waikato River Catchment above Huntly and Karapiro

Generally, non-complying activity applications for surface water takes within the Waikato River catchment upstream of the HPS mixing zone shall not be granted unless the take:

a) Is a zero net take; or
b) Replaces a consented take for an activity listed in Policy 15 a)v); or
c) Achieves a higher level of renewable electricity generation within the Waikato River catchment than would otherwise be achieved were the consent declined; or
d) Is located between the Karapiro Dam and the HPS mixing zone but would not adversely affect electricity generation from the Huntly Power Station.

Policy 14: Non-Complying Activities outside Waikato River Catchment and below Huntly within Waikato River Catchment

Generally, non-complying activity applications for a takes located anywhere in the Region outside of the catchment area covered by Policy 13 shall not be granted unless the take:

a) *Is a zero net take, or*
b) *Replaces a consented take for an activity listed in Policy 15 a)v); or*
c) *Achieves a higher level of electricity generation that would otherwise be achieved were the consent declined, or*
d) *Is for the ecological enhancement of wetlands, or*
e) *Avoids the further degradation of water quality as provided for in Chapter 3.2 of this Plan.*

4.2 The rationale for the above policies was set out at paragraph [331] of the decision:

New policies [13 and 14] … are drafted in such a way that, in my opinion, decision-makers are left in no doubt that non-complying activity applications within the Huntly Power Station outfall … are not to be granted unless they achieve the higher level of electricity generation than would otherwise be achieved if the application was declined. This type of approach is based on the non-derogation of existing electricity generation capacity, whilst allowing flexibility for the more efficient or innovative use of water for electricity generation purposes.

4.3 The appeal considered whether the policies effectively created prohibited activities. The Environment Court referred to *Auckland Regional Council v North Shore City Council* [1995] 3 NZLR 18, in which the Court of Appeal found that a policy was "a course of action" and as such may be either flexible or inflexible, broad or narrow. A policy may therefore include something highly specific.[3]

4.4 The Environment Court also commented on the use of the word "generally":[4]

[3] *Carter Holt Harvey Ltd v Waikato Regional Council* [2011] NZEnvC 380 at [336]
[4] *Carter Holt Harvey Ltd v Waikato Regional Council* [2011] NZEnvC 380 at [338]

It is commonly understood that the word ["generally"] provides guidance to decision-makers that the policy should not be blindly applied in a blanket fashion to all consent applications. The strength of [the policies] in such [sic] that the starting presumption is appropriately against the grant of non-complying activities, but each case must be assessed on its individual merits based on the evidence presented to the decision maker at the time.

4.5 Policy 4.6 differs from the policies considered in *Carter Holt Harvey Ltd v Waikato Regional Council* [2011] NZEnvC 380 in a number of respects, including:

4.5.1 Policy 4.6 will be implemented, in part, by rule 5.98 which provides that the taking and use of surface water from a river or lake, where the take does not comply with any limits, is a prohibited activity. In comparison, the above policies related to non-complying activities, for which resource consent may be granted if the additional tests in section 104D of the RMA are satisfied.

4.5.2 Policy 4.6 specifically relates to policies A3 and B5 of the NPSFM which require regional councils to ensure quality limits and targets will be met and no future quantity over-allocation will occur. The policies above were not so specifically directed at compliance with the NPSFM.

4.5.3 Policy 4.6 does not set out the circumstances in which resource consents could be granted. In comparison, the above policies set out the specific circumstances which are considered exceptions to the general position and in which resource consents could be granted.

4.6 The Environment Court decision in *Carter Holt Harvey Ltd v Waikato Regional Council* [2011] NZEnvC 380 also supports EDS's submission on Policy 4.6 in two respects:

4.6.1 As set out above, the Environment Court stated that the word "generally" means that "*the starting presumption is appropriately against the grant of [resource consent], but each case must be assessed on its individual merits".* On this basis, the inclusion of the word "generally" in Policy 4.6 means that it does not give effect to the NPSFM as it would allow recourse consents to be granted where a water quality or quantity limit is breached, in some (unspecified) circumstances.

4.6.2 As set out above, the Environment Court recognised that a policy may be flexible or inflexible and broad or narrow. It is therefore open for Policy 4.6 to be highly specific and EDS has submitted that good planning practice and the requirements of the NPSFM favour this.

*5 Paragraph 45. The chairman queried whether or not the sentence was intended to read as follows "the court held that an activity need **not** be forbidden outright, with no contemplation of any change or exception, before prohibited activity status is appropriate". The chairman queried whether the word "not" is actually intended in that sentence.*

5.1 The inclusion of the word “not” is intended. In *Coromandel Watchdog of Hauraki Inc v Chief Executive of the Ministry of Economic Development* [2008] 1 NZLR 562 the question of law considered by the Court of Appeal was:

> Did the High Court err in holding that a prohibited activity status can only be used when a planning authority is satisfied that, within the time span of the Plan, the activity in question should in no circumstances ever be allowed in the area under consideration?

5.2 The Court of Appeal answered that question in the affirmative and went on to state that the precautionary approach may be a reason for choosing to adopt a prohibited activity classification.[5]

5.3 For example, where a local authority has insufficient information about an activity at the time of the plan being formulated it may adopt a precautionary approach and decide to classify the activity as prohibited. In such a situation, the local authority would not need to be satisfied that the activity should in no circumstances ever be allowed within the time span of the plan as new information may arise that allows the activity to be re-evaluated and the plan to be changed.

6 Paragraph 58. The chairman queried whether or not declining consent for existing activities must be referred to in the policy in such absolute terms.

6.1 EDS’s concern relates to the words “Existing hydro-generation and irrigation schemes are recognised as part of the existing environment. In reconsenting the schemes…”. These words imply that existing hydro-generation and irrigation schemes *will* be reconsented. EDS does not request that the policy is amended to indicate that resource consent may be declined, but rather that it is amended to remove the suggestion that resource consents will not be declined, for example:

> *~~Existing hydro-generation and irrigation schemes are recognised as a part of the existing environment.~~ ~~In reconsenting the schemes~~ If an existing hydro generation or irrigation scheme is reconsented, it is expected that there will be improvements in the efficiency of water use and conveyance assessed over the life of the consent and reductions in any*

[5] *Coromandel Watchdog of Hauraki Inc v Chief Executive of the Ministry of Economic Development* [2008] 1 NZLR 562 at [41] and [45].

adverse effects on flows and levels in water bodies in order to maximise the term of the consent.

7 Paragraph 74. Regarding EDS's statement that it would like to see "robust scientific evidence", the panel queried whether or not the evidence would have to be scientific in particular for smaller properties i.e. would not a robust cost/benefit analysis on efficiency be sufficient?

7.1 Section 32(3)(b) of the RMA requires an evaluation of whether, have regard to their efficiency and effectiveness, the policies, rules or other methods are the most appropriate for *achieving the objectives*. The relevant objectives include:

Objective 3.8: The health of ecosystems is maintained or enhanced in lakes, rivers, hāpua and wetlands.

Objective 3.13: Those parts of lakes and rivers that are values by the community for recreation are suitable for contact recreation.

Objective 3.23: All activities operate at "good practice" or better to protect the region's fresh water resources from quality and quantity degradation.

7.2 EDS considers that robust scientific evidence establishing the extent of contaminants discharged from smaller properties and larger properties, is necessary to determine whether differentiating between properties based on their size is the most appropriate way, in terms of efficiency *and effectiveness,* to *achieve the objectives* of the Proposed Plan.

8 Paragraph 78. The chairman suggested deletion of the words struck through as follows "EDS submits that existing activities should be permitted only if ~~it can be shown that~~ there will be no net increase in nutrients discharged from the property". Does this achieve the same outcome for EDS?

8.1 EDS's concern is that the requirement to prepare a farm environment plan for existing high nutrient risk farming activities (and provide information on the farming activity for other activities) will not guarantee that there is no increase in nutrient discharges in 'red areas'. EDS requested that an additional condition be added to this rule requiring no net increase in nutrients discharges. It will be necessary for the annual amount of nutrient loss from the land to be assessed in order to determine compliance with this condition. EDS agrees that concise language should be preferred and the words that have been struck out may be redundant.

9 *Paragraph 89. The chairman asked that EDS clarify the difference between "enabling" and "promoting" for the purpose of this point in the submission.*

9.1 'Promoting' is an active role that requires positive action. It is defined in the Oxford Dictionary as "support or actively encourage (a cause, venture, etc.); further the progress of".[6] Similarly, 'providing for' an outcome (wording often used in the RMA context) also requires positive action and is defined in the Oxford Dictionary as "make adequate preparation for".[7]

9.2 In contrast, 'enabling' is a passive role that does not require positive action. It is defined in the Oxford Dictionary as "give (someone) the authority or means to do something; make it possible for".[8] In *Wakatipu Environmental Society Inc v Queenstown Lakes District Council* [2000] NZRMA 59 the Environment Court stated:

[T]he role of councils under the RMA in relation to social, economic and cultural activities is essentially a passive one. It is to enable people and communities to provide for their wellbeing, not to direct how that is to be achieved.[9]

9.3 Similarly, in *Southern Alps Air Ltd v Queenstown Lakes District Council* [2007] NZRMA 119, in relation to the safety of a commercial jet boating operation, the Environment Court said:

[S]ection 5 of the RMA appears to concentrate on the bottom lines of section 5(2)(a), (b) and (c), leaving people and communities to arrange their social objectives for themselves. One of those objectives in the first part of section 5(2) is about enabling people to look after their safety, not regulating or even managing for it.[10]

9.4 And in *Marlborough Ridge Ltd v Marlborough District Council* [1998] NZRMA 73 the Environment Court stated:

Our role as we perceive it under section 5 is to enable people to provide for that wellbeing. In other words, the scheme of the Act is to provide the "environment" or conditions in which people can provide for their wellbeing.[11]

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[6] http://oxforddictionaries.com/definition/english/promote?q=promote
[7] http://oxforddictionaries.com/definition/english/provide?q=provide+for#provide__10
[8] http://oxforddictionaries.com/definition/english/enable?q=enable
[9] *Wakatipu Environmental Society Inc v Queenstown Lakes District Council* [2000] NZRMA 59 at [181]
[10] *Southern Alps Air Ltd v Queenstown Lakes District Council* [2007] NZRMA 119 at [33].
[11] *Marlborough Ridge Ltd v Marlborough District Council* [1998] NZRMA 73 at 7.4

DATED this 23nd day of April 2013

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