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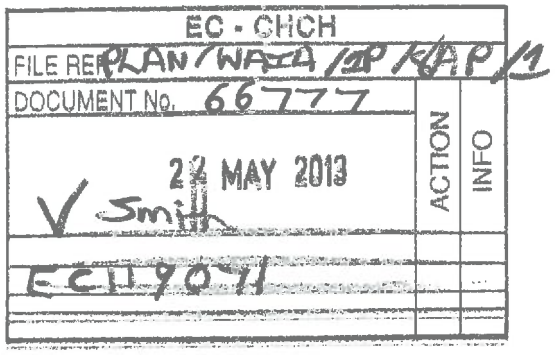

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21 May 2013

Dear Submitter

Re: Hurunui Water Project Limited v Canterbury Regional Council – Proposed Hurunui and Waiau River Regional Plan and Proposed Plan Change 3 to the Canterbury Natural Resources Regional Plan

With reference to the above, please find enclosed by way of service a copy of the Notice of Appeal which was filed in the Christchurch High Court on Thursday, 16 May 2013

Yours faithfully

Ewan Chapman/Shoshona Goodall
Partner/Associate

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IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV 2013

Under	the Resource Management Act 1991
In the matter	of an appeal under s66 of the Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010
Between	**HURUNUI WATER PROJECT LTD**, a duly incorporated company with its registered office at 127 Armagh Street, Christchurch. Appellant
And	**THE CANTERBURY REGIONAL COUNCIL**, a Regional Authority under Schedule 2 of the Local Government Act 2002 Respondent

NOTICE OF APPEAL UNDER S66 OF THE ENVIRONMENT CANTERBURY (TEMPORARY COMMISSIONERS AND IMPROVED WATER MANAGEMENT) ACT 2010

16 MAY 2013

Next event date 2013

Judicial Officer

Duncan Cotterill
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To The Registrar of the High Court at Christchurch

and

To The Canterbury Regional Council

This document notifies you that:

1. The Appellant will move the High Court at Christchurch by way of appeal against the decision of the Canterbury Regional Council ("the Council") in relation to the Proposed Hurunui Waiau River Regional Plan ("the Plan"), which was publically notified on 27 April 2013.

2. The Appellant lodged submissions in respect of the Plan.

A. The Canterbury Regional Council made the following errors of law:

Nutrient Load Limits

1. The Council erred in approving Policy 5.3B in that this contains the same key performance criteria as Rule 11.1A, resulting in an activity status that has no prospect of success.

2. The Council erred in approving a plan which does not provide an ability for nutrient loads to be allocated pending implementation of resource consents for the storage and reticulation of water, in that this fails to reflect its own decision which recognises a need for water storage; and which makes the Plan internally inconsistent.

3. The Council erred in determining it had jurisdiction to approve the provisions relating to nutrient load limits deriving from the operation of Schedule 1 in that these provisions are uncertain as they:

   3.1 Do not expressly exclude increases by landowners who incrementally intensify their operations;

   3.2 Do not expressly benchmark load limits to include consents that have been granted but not yet implemented;

   3.3 Rely on nutrient load limits as a tool for managing water quality; and/or

3.4 Do not include any methodology for calculating the load limits.

4. The Council erred in providing a pathway for the grant of resource consents that may not be able to be implemented due to nutrient load limits.

Prohibited activity status for damming the Hurunui Mainstem and South Branch

5. The Council failed to undertake an analysis required by section 32 of the Resource Management Act 1991 ("the Act"), in that it failed to assess the costs associated with making damming of the Hurunui Mainstem and South Branch a prohibited activity.

6. The decision to make damming of the Hurunui Mainstem and South Branch a prohibited activity is inconsistent with the reasoning in the decision, including at paragraphs 73 and 117, in that it does not enable consideration of damming.

7. The Council erred in determining that damming of Lake Sumner should be prohibited in order to enable compliance with the Canterbury Regional Policy Statement ("CRPS").

8. The Council, in concluding that the prohibited activity status for damming on the Mainstem and South Branch is in accordance with the provisions of section 6(a),(b),(c),(d) and (e), erred in exercising a preference to section 6 matters above section 5 which is contrary to the judicial interpretation of Part II of the Act.

B and C Block Policies

9. The Council erred in approving Policy 3.5 which does not implement Objective 3 of the Plan as required by the Act, and which makes the Plan internally inconsistent.

10. In formulating Policy 3.5 the Council erred in exercising a preference to section 6 matters above section 5 which is contrary to the judicial interpretation of Part 2 of the Act.

11. In formulating Policy 3.5 the Council erred in requiring the matters in paragraphs (a) – (l) of that Policy to be "achieved" in circumstances where some of those matters are not currently being achieved, which is contrary to the Act.

Policies regarding Storage and Additional Demand for Water Resources

12. The Council erred in approving Policies 6.4 and 6.5, and in particular the phrase "are not able to proceed" which is uncertain.

13. The Council erred in approving Policies 6.4 and 6.5 in that it is an error of law to require an applicant to demonstrate that all alternatives for water storage in Zones B and C are not able to proceed.

B. The questions of law to be resolved:

Nutrient Load Limits

1. Can the Council approve a policy containing the same key performance criteria as the related rules; and in approving Policy 5.3B did the Council create an activity status that has no prospect of success, in contravention of the Act?

2. Has the Council, in approving a plan which does not provide an ability for nutrient loads to be allocating pending implementation of resource consents for the storage and reticulation of water, failed to reflect its own decision which recognises a need for water storage; and has this made the Plan internally inconsistent?

3. Do the provisions relating to nutrient load limits meet the legal test for being certain, or are they void for uncertainty?

4. Did the Council err in providing a pathway for the grant of resource consents that may not be able to be implemented due to nutrient load limits?

Prohibited activity status for damming the Hurunui mainstem and south branch

5. Did the Council assess the costs of the proposed prohibited activity rule as required by section 32 of the Act; and was there evidence before the Council to enable it to do so?

6. Did the Council err in approving a prohibited activity rule which fails to enable consideration of damming on a case by case basis, and which is therefore inconsistent with the reasoning in the Council's decision?

7. Did the Council err in determining that damming of Lake Sumner should be prohibited in order to enable compliance with the CRPS?

8. Did the Council, in concluding that the prohibited activity status for damming of the Hurunui Mainstem and South Branch is in accordance with section 6 (a)(b)(c)(d) and (e), exercise a preference to section 6 matters above section 5 which is contrary to the judicial interpretation of Part II of the Act?

B and C Block Policies

9. Has the Council, in approving Policy 3.5, approved a policy which is inconsistent with other parts of the Plan, in that Policy 3.5 does not implement Objective 3 as required by the Act?

10. Has the Council, in approving Policy 3.5, erred in exercising a preference to section 6 matters above section 5 which is contrary to the judicial interpretation of Part II of the Act?

11. Did the Council err in law by requiring the matters in paragraphs (a) – (l) of Policy 3.5 to be "achieved" in circumstances where some of those matters are not currently being achieved?

12. Did the Council, in making its decision to approve Policies 6.4 and 6.5 in the form it did, approve policies which meet the legal test of being certain, or are they void for uncertainty?

13. Did the Council err in law by requiring in Policies 6.4 and 6.5 an applicant to demonstrate that there are no alternatives for water storage in Zones B and C?

C. **Grounds for Appeal:**

Nutrient Load Limits

First Error of Law

1. Rule 11.1A provides that it is a non complying activity to exceed the load limits in Schedule 1. As a non complying activity it is necessary for an application to pass one of the gateway tests in section 104D of the Act.

2. An activity that breaches the load limits will not be able to satisfy section 104D(1)(a), in that the adverse effects of the activity on the environment will not be considered by Council to be minor.

3. Therefore in order for an application to be granted it will be necessary to show that an application is not contrary to the objectives and policies of the Plan.

4. Policy 5.3B only allows land use changes that will not result in a breach of Schedule 1. This is the same requirement as the trigger for a non complying activity and therefore Rule 11.1A and Policy 5.3B are circular in nature.

5. Therefore an application that involves a breach of Schedule 1 will not be able to satisfy the alternative gateway test as set out in section 104D(1)(b) in that the proposal will be considered contrary to the key policy associated with rule 11.1A.

6. As a result, the Plan does not provide a mechanism for satisfying either of the gateway tests in section 104D. This is inconsistent with the decision to make such applications a non complying activity (which must necessarily mean there is an intention that there be a window of opportunity for such applications to be granted), and is not in accordance with the Act.

Second error of law

7. The decision and the objectives and policies of the Plan recognise the need for water storage.

8. Water storage proposals are long term projects involving substantial investment by the community.

9. The Plan does not provide a pathway to lock in or allocate nutrient loads pending implementation of the storage and reticulation of water.

10. This does not provide sufficient certainty that storage projects are able to proceed when implemented. This is inconsistent with the decision and the objectives and policies of the plan which recognise the need for water storage.

Third error of law

11. The Plan contemplates that applications may be made for further intensification of land use up to a 25% increase above current levels. Incremental uptake of the available headroom by farmers changing stocking rates and fertiliser application regimes could erode the available 25% headroom which storage projects rely on for associated irrigation. The Plan, in not expressly providing for how much incremental uptake is to affect the available load, results in the provisions being void for uncertainty.

12. The use of the load limit itself as a tool to manage water quality is uncertain and will not achieve the environmental outcomes sought to be achieved. The load can vary over 100% from year to year and the load can be exceeded based purely on climatic conditions even where there has been no change in land use practices. This tool is therefore not capable of being applied in a way that provides certainty for the Council or applicants.

13. The Plan requires compliance with nutrient load limits, but does not contain any guidance or methodology for calculating the load in the river to enable a user of the plan to determine whether a change will remain below the load limit. The user of a plan will therefore not be able to establish whether they are required to obtain resource consent under those rules.

Fourth error of law

14. Incremental uptake of the available headroom in the nutrient load limits by farmers changing stocking rates and fertiliser application regimes could erode the available 25% headroom which storage projects rely on for associated irrigation.

15. Should this occur then consents that are granted on the basis that headroom is available at the time of the application may not be able to be implemented.

Prohibited activity status for damming the Hurunui Mainstem and South Branch

Fifth error of law

16. The section 32 analysis to support the notified Plan did not include an assessment of the costs and benefits of including Lake Sumner and the South Branch in Zone A and therefore making the damming of the South Branch and the reach of the Hurunui below Lake Sumner a prohibited activity.

17. The Commissioners did not receive evidence regarding the costs (including the costs to the rural community and costs to the environment) of making the damming of the South Branch and the reach below Lake Sumner a prohibited activity. These costs have therefore not been assessed as required by section 32 of the Act.

Sixth error of law

18. The decision of the Commissioners stated at paragraph 73:

> *... We consider that the imposition of a prohibited activity status for damming is the most appropriate of the options available. This is because consideration of the damming of either the north or the south branch within the upper catchment should start with a presumption that it should not happen, rather than a presumption that it may be appropriate.* (emphasis added)

19. The decision therefore clearly envisages consideration of applications for damming, but the decision to make this a prohibited activity absolutely prevents applications being made. Therefore no consideration can be given to applications, and it is more than a presumption that it cannot occur, rather it is an absolute prohibition.

20. The decision to making damming of the Hurunui Mainstem and South Branch a prohibited activity is therefore inconsistent with the reasoning in the decision; and the decision fails to give effect to that reasoning.

Seventh error of law

21. The Council's decision at paragraph 25 concludes that in the case of the mainstems of the Hurunui, damming is permissible under the CRPS provided the effect of it is to comply with clause (3). Clause (3) provides:

> *In respect of every natural lake by limiting any use of the lake for water storage so its level does not exceed or fall below the upper or lower levels of its natural operating range.*

22. At paragraph 73 the decision it is stated that prohibiting damming of the Hurunui Mainstem enables compliance with the CRPS.

23. Having already determined that it is not a policy that prevents damming, the Council relied on the CRPS to require an absolute prohibition on damming.

Eighth error of law

24. The Council in its decision states at paragraph 73:

> *... Our conclusions are also in accordance with part 2 of the Act and, in particular, the provisions of Sections 6(a)(b)(c)(d) and (e).*

25. This fails to recognise section 5 of the Act and the primacy of that section over section 6 considerations.

<u>B and C Block Policies</u>

Ninth error of law

26. Objective 3 is that water is allocated so as to enable further economic development. The Objective uses the term "while" and then lists the environmental protection aspects of the Objective. The use of the word "while" allows a balancing exercise to be undertaken, which is consistent with the purpose of the Act.

27. However Policy 3.5 elevates environmental protection over enabling the taking of water by only allowing that to occur "provided all" of the environmental objectives in the policy are "achieved".

28. The extremely narrow wording of the Policy defeats the overriding objective of "enabling allocation of water for further economic development" and does not allow a balancing exercise to be applied. Unlike Objective 3, Policy 3.5 elevates environmental protection over the enabling the allocation of water, and the goal of achieving the sustainable management of resources.

29. Policy 3.5 does not therefore implement Objective 3 as required by section 68 of the Act.

Tenth error of law

30. Policy 3.5 requires the matters listed in (a) – (l) to be achieved. These matters are therefore treated as bottom lines.

31. Unlike Objective 3, this policy does not allow these matters to be balanced against matters such as enabling further economic development.

32. Policy 3.5 is therefore not in accordance with a proper interpretation of Part II of the Act.

Eleventh error of law

33. Policy 3.5 provides that water is only allowed to be taken and used from the C permit allocation limits provided all of the matters specified in (a) – (l) are achieved.

34. Some of those matters are not currently being achieved.

35. It is not in accordance with the Act for an applicant to be required to *enhance* the existing environment.

Twelfth error of law

36. Policies 6.4 and 6.5 require that it be demonstrated that opportunities for water storage in Zones B and C are not able to proceed.

37. It is uncertain what is meant by the phase "not able to proceed" and what would satisfy this requirement.

Thirteenth error of law

38. Policies 6.4(b) and 6.5(ab) purport to require an applicant to demonstrate that opportunities for water storage in Zones B and C are not able to proceed.

39. Each application must be considered on its own merits and it is an error of law to require every alternative to be eliminated.

D. **Relief Sought**

The Appellant seeks orders that the appeal be allowed and:

1. That the Canterbury Regional Council's decision on the plan provisions referred to in this appeal be quashed and either:

    1.1 That these provisions be amended to:

        1.1.1 Delete from Policy 5.3B the reference to the load limits in Schedule 1; or that the Plan be amended to introduce alternative periphyton or water quality objectives so that it is possible for an application for a non complying activity to be granted.

        1.1.2 Require the Council to provide an allocative mechanism for the available nutrient load.

        1.1.3 Decrease the emphasis placed on the load limits in the Plan.

        1.1.4 Specify a mechanism for either individual farmers or farmers collectively to determine when a consent is required or for the

plan to set out a methodology so as to provide certainty of the available load.

1.1.5 Remove prohibited activity rule 5.1 and to replace this with an alternative activity status, with consequential changes to objectives, policies and rules.

1.1.6 Revert the wording of Policy 3.5 to that contained in the notified version of the Plan, or that it be otherwise amended to give effect to Objective 3.

1.1.7 To revise or delete Policies 6.4 and 6.5 and remove the reference to requiring demonstration that the other options referred to are not able to proceed.

1.1.8 Either remove the reference to "not able to proceed" or amend the term to reflect RMA principles.

1.2 Or that the Council be ordered to reconsider these provisions in light of the findings of the High Court, and any further evidence required to be presented.

2. Such other relief that will meet the concerns of the Appellant.

3. That the Respondent pay the Appellant's costs of this appeal.

Dated 16 May 2013

Ewan Chapman / Shoshona Goodall
Solicitors for the Appellant

This document is filed by Ewan Chapman of Duncan Cotterill, Solicitor for the Appellant.

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- Transmitted to the solicitor by fax on +64 3 379 70977
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