

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

**A N D**

**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 (HEARINGS 2 and 3) ON BEHALF OF RDRML**

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**Introduction**

1. These supplementary legal submissions, and accompanying statements of supplementary evidence,<sup>1</sup> are filed further to the presentation of RDRML's Hearing 2 and 3 submissions and evidence on 4 June 2013. They address the following issues which arose in the course of RDRML's presentation:

(a) Hearing 2

(i) The decision of the Environment Court in *Application by Barrhill Chertsey Irrigation Limited*, C119/2008, 31 October 2008 (the **Barrhill Chertsey Decision**).

(ii) The basis on which the reference in the Statement of Supplementary Rebuttal Evidence of Nigel Roland Bryce (Hearing 2) to 10 kg/N/ha<sup>2</sup> was derived.

(b) Hearing 3

(i) The relationship between the irrigation and hydro generation uses which the RDR supports.

(ii) On farm reliability impacts within the RDR irrigation schemes.

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<sup>1</sup> Nigel Bryce (Hearings 2 and 3), Richard de Joux (Hearing 3), and Andy Macfarlane (Hearing 3).

<sup>2</sup> Page 3.

- (iii) The relationship of RDRML's proposed Note 1 to Table 12<sup>3</sup> to Policy 4.47.
- (iv) Proposed National Environmental Standard on Ecological Flows and Water Levels: Discussion Document (**NES**).

## Hearing 2

### ***Barrhill Chertsey Decision***

2. In outlining the land use consent application made by RDRML to the Canterbury Regional Council, the Commissioners asked questions regarding the existing resource consents held by RDRML, and how the land use consent (if granted) would relate to those. In replying to those questions, reference was made to the Barrhill Chertsey Decision, as in that case declarations were sought to ensure that the proposal by Barrhill Chertsey Irrigation Limited (**BCIL**) to utilise the RDR would not compromise the RDRML consents. The Barrhill Chertsey Decision therefore involved detailed discussion of the RDRML consents.
3. A copy of the Barrhill Chertsey Decision accompanies these supplementary legal submissions. As outlined in broad terms on 4 June 2013:
  - (a) The application for declarations related to a proposal by BCIL to utilise the existing RDRML water distribution infrastructure and construct new elements for it, together with a new hydro electric project, so as to enable expansion of the infrastructure, a greater irrigation area to be covered, and rationalise distribution of water between the two schemes. Specifically, the application for declarations related to the impact of the BCIL proposal upon RDRML's existing consents.
  - (b) The Environment Court had available to it the full RDRML resource consent applications and accompanying documents relating to the

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<sup>3</sup> Statement of Evidence of Nigel Roland Bryce (Hearing 3), page 23: "*Note 1: All applications in the Ashburton Sub-regional area are subject to the rules of this section, including where this relates to a group or community water supply scheme.*"

RDRML consents in question (paragraphs 11 and 12). It saw a particular issue as (paragraph 13):

*the extent to which a resource consent is conditioned by the application and supporting documentation filed beyond the express conditions included within the consent.*

- (c) The Environment Court recognised the nature of the issues for RDRML in having to consider the BCIL proposal, noting that (paragraph 24):

*The consequence of all this is that the RDRML irrigation schemes have a very high level of reliability. It was acknowledged that the Barrhill Chertsey consents would not give its members the same level of reliability. Accordingly any contractual arrangement between the pair would need to ensure that RDRML priority is maintained unless there is a specific agreement to the contrary by all of the participants.*

- (d) The Environment Court closely considered the consents that were obtained by RDRML (paragraphs 25-31) and whether the information supplied by RDRML justified the application or limited its scope (paragraphs 34-41). Its overall conclusions are set out at paragraphs 59-62. Of most relevance to the issues discussed on 4 June 2013, the Environment Court:

- (i) Concluded at paragraph 59(c) that:

*there is no constraint intent in the consent itself [nor we note in the application or accompanying documents] that there could be no extensions to the race system or new areas included. We do accept however, as Mr Davidson said, that it would be intended that the areas serviced in terms of the existing RDRML consents would be largely within the areas indicated in its maps. However, on its face this would not prevent a new consent to extend the Race into a new irrigation area but using the existing infrastructure.*

- (ii) Said further at paragraph 62 that:

*Although we have concluded tentatively that the area covered by the consent is likely to be the entire area between the Rangitata and Rakaia, a more constrained construction would not prevent further areas obtaining consents utilising the water in terms of the original consent CRC 011237. We conclude that the takes and utilisation of the diversion race would be unaffected if new areas were added. The issue would then be whether the new areas were justified' and whether they had any particular effects on existing users.*

- (e) The result was that the Environment Court granted declarations (subject to final drafting) regarding the impact of the BCIL proposal upon the RDRML consents. In doing so, the Environment Court made a number of relevant comments, including that:
- (i) The RDRML infrastructure would cost many millions of dollars to replicate or replace (paragraph 20);
  - (ii) The RDRML consents are broadly worded. In the case of the RDRML consents, the water is to be taken and diverted to the Rangitata Diversion Race.... *and used for stock water, irrigation and electricity generation* (paragraph 56);
  - (iii) On the issue of whether the grant of a consent to BCIL would affect RDRML's existing consents or any rights to renew or vary RDRML's consents, the Court noted that "*The joint utilisation of a common infrastructure may in fact be a benefit of any further application and may even imbed RDRML as the infrastructure supplier in that area*" (paragraph 74).

#### **Reference to 10 kg/N/ha**

4. Commissioner van Voorthuysen sought clarification of the basis on which the reference in the Statement of Supplementary Rebuttal Evidence of Nigel Roland Bryce (Hearing 2) to 10 kg/N/ha<sup>4</sup> was derived.
5. Accompanying these supplementary legal submissions, is a Response to Questions Asked in Relation to Evidence of Nigel Roland Bryce (Hearing 2 and 3) which addresses this matter.

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<sup>4</sup> Page 3.

### Hearing 3

#### *Irrigation and hydro generation uses*

6. RDRML's resource consents authorise the take and use of water for irrigation and stockwater purposes, and to generate electricity. The take and use consent relating to the Ashburton River is appended to the Statement of Evidence of Nigel Roland Bryce (Hearing 3).<sup>5</sup>
7. The Commissioners may recall that the Statement of Evidence of Benedict Rodney Curry dated 4 February 2013, exchanged for Hearing 1, addressed the relationship between the two uses as follows:<sup>6</sup>

*Operationally, the RDR is unique given that it plays a dual role in abstracting and conveying water. That is, it is not an end user of this water, but simply a conveyance infrastructure to supply irrigation, stockwater and water for power generation. **Reflecting this, during the period of September to May priority is given to meeting irrigation needs. Any water surplus to those needs is retained in-race and used for power generation. For the remaining winter months, May to September, the irrigation schemes are shut down and all water is used solely for power generation purposes.** Importantly, a key function of the RDR is to ensure that water is available all year round for stockwater supply and forms a cornerstone of the Company's responsibilities to its shareholders (including the Ashburton District Council owned Ashburton Stockwater Supply system).*

8. As submitted orally on 4 June 2013, during the irrigation season (September to May) water is provided to the irrigation schemes if it is needed, with any water not demanded by the irrigation schemes going to Highbank for electricity generation.
9. This is relevant to the point made verbally by Mr Curry at Hearing 3 on 4 June 2013, that any reduction in the water available to RDRML from the Ashburton River during the irrigation season has an impact on TrustPower even if the RDR irrigation schemes do not require it, because any water surplus to irrigation needs is used for electricity generation at Highbank.
10. As the Commissioners will be aware, the National Policy Statement for Renewable Electricity Generation 2011 recognises the national significance of

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<sup>5</sup> Appendix C.

<sup>6</sup> Paragraph 4.4.

renewable electricity generation activities.<sup>7</sup> Policies within that National Policy Statement provide that decision makers shall recognise and provide for the national significance of renewable electricity generation activities, including maintaining or increasing electricity generation capacity,<sup>8</sup> and have particular regard to:<sup>9</sup>

*Maintenance of the generation output of existing renewable electricity generation activities can require protection of the assets, operational capacity and continued availability of the renewable energy resource.*

11. It is submitted that this relevant to the Commissioners' consideration of the environmental flow and allocation regime for the Ashburton River, because any reduction in the water available to RDRML from the Ashburton River has an impact on TrustPower *including during the irrigation season*. That is because during the irrigation season, if the RDR irrigation schemes do not require available water, any water surplus to irrigation needs is used for electricity generation at Highbank.
12. It is noted finally that the Barrhill Chertsey Decision referred to earlier in these supplementary submissions also discusses the relationship between the irrigation and hydro electricity generation uses which the RDR supports.

### ***On farm reliability impacts***

13. Further to the questions posed by Commissioner van Voorthuysen, regarding on farm reliability impacts, both Richard de Joux and Andy Macfarlane have considered the issues and sought to respond to the questions raised.
14. Supplementary (Hearing 3) statements of evidence from both Richard de Joux and Andy Macfarlane accompany these submissions.
15. The Supplementary Statement of Evidence of Richard de Joux (Hearing 3) looks at a daily time series for the period 1967 to 2011, and has been analysed to determine the number of days when RDRML could either fully

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<sup>7</sup> Objective.

<sup>8</sup> Policy A a).

<sup>9</sup> Policy B a).

take, partly take, or not take water from the South Ashburton River. It compares these to changes under the LWRP regime:

- (a) With no Ashburton District Council (**ADC**) reduction in take upstream of RDRML intake;
  - (b) With only a 544 l/s cutback in the ADC take;<sup>10</sup>
  - (c) With a 900 l/s cutback in the ADC take upstream of the RDRML intake (as sought by RDRML in order to maintain existing levels of reliability).
16. Mr de Joux confirms that a reduction of 900 l/s in the ADC take upstream of the RDRML intake maintains the existing reliability.
  17. The Supplementary Statement of Evidence of Andy Macfarlane (Hearing 3) considers Mr de Joux's calculations. He considers that whilst it would be reasonable to exclude April and May from the calculations, the quantification of on farm impacts in his evidence presented on 4 June 2013 is likely to be a very conservative approximation of impacts on reliability (in other words, an absolute minimum).
  18. Section 13 of the LWRP states that other outcomes to be achieved by the flow regime include "*maintenance and improvement of reliability of supply for current water users*".<sup>11</sup> It is submitted that it remains the case that in order to maintain or improve reliability for RDRML, a reduction in the ADC take upstream of RDRML intake by 900 l/s is required before Table 12 is implemented (in the form advanced by RDRML on 4 June 2013).

#### ***Relationship of proposed Note 1 to Table 12 with Policy 4.47***

19. Commissioner van Voorthuysen sought Mr Bryce's view on the relationship between RDRML's proposed Note 1 to Table 12 to Policy 4.47.

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<sup>10</sup> The reasoning for using the 544 l/s reduction is to retain consistency with the modelling carried out by Horrell for the S42A report.

<sup>11</sup> LWRP, page 13-1.

20. The Response to Questions Asked in Relation to Evidence of Nigel Roland Bryce (Hearing 2 and 3) addresses this matter. It is noted that:
- (a) Reference is also made to Policy 4.46 as this appears directly relevant to the discussion.
  - (b) Mr Bryce highlights potential tension between Policies 4.46 / 4.47 and aspects of section 13, and provides his opinion as to why the more specific and explicit policies of section 13 should be afforded more weight.
  - (c) Mr Bryce confirms that his proposed inclusion of Note 1 seeks to ensure that existing stockwater supply takes, such as the ADC's take, are subject to the rules of section 13. This, in turn, will also ensure that the ADC's existing abstraction is able to be reviewed in line with the outcomes in Policy 13.4.1, and the medium term flow and allocation regimes provided for under Table 12.

## **NES**

21. In the legal submissions presented for RDRML on 4 June 2013 it was submitted that the NES is a "*draft*" NES. In response to questions, it was noted in oral submissions that:
- (a) The relevant RMA provisions do not use the term "*proposed national environmental standard*". That can be contrasted with the term "*proposed national policy statement*" which is used in various sections of the RMA.<sup>12</sup>
  - (b) Section 44 of the RMA, which prescribes the steps which must be followed before recommending the making of a national environmental standard to the Governor-General, requires notification to the public and iwi authorities of "*the proposed subject matter of the standard*".<sup>13</sup>

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<sup>12</sup> Sections 46, 46A, 47, 48-52.

<sup>13</sup> Section 44(2)(a)(i). The term "*proposed subject matter of the standard*" is also used in ss 44(2)(b)(i) and (ii).



- (c) National environmental standards, once brought through by the Governor-General by Order in Council, are regulations.
22. It was submitted that accordingly the term "*draft*" NES was not incorrect, that the draft NES has no particular legal status, but once made into regulations by the Governor-General by Order in Council has the effect of regulations.
23. Commissioner van Voorthuysen noted that the NES is titled "*Proposed National Environmental Standard on Ecological Flows and Water Levels: Discussion Document*". Having looked at the matter further, it is noted that the public notice which called for submissions on the NES (obtained from the Ministry for the Environment website and attached as an Appendix) referred to both a "*proposed national environmental standard*" and "*a discussion document outlining the subject matter and rationale of the proposed standard*". It is submitted that this does not particularly advance matters as whilst it uses the term "*proposed national environmental standard*" it also suggests that the document consulted on is a discussion document of the subject of and reasons for, rather than, the proposed standard itself.
24. It is further noted that the NES does not appear to have been put into the form of regulations. In this regard, others may therefore disagree with the use of the term "*draft*" NES as it is not in the form of draft regulations.
25. Overall, it is submitted that:
- (a) The RMA itself does not contain any particular terminology for a future national environmental standard which has not yet been made into regulations by the Governor-General by Order in Council. Section 44 does require consultation in relation to the "*proposed subject matter of the standard*".
- (b) National environmental standards, once brought through by the Governor-General by Order in Council, are regulations.
26. It remains RDRML's submission that the Commissioners should not have regard to the NES (whether "*draft*" or "*proposed*") because it has not yet been made into regulations by the Governor-General by Order in Council and so

the outcome of it cannot be presumed, and for the reasons set out in the legal submissions for RDRML dated 4 June 2013.

**DATED** at **TAURANGA** this 12<sup>th</sup> day of June 2013



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**Vanessa Jane Hamm**

(Counsel for Rangitata Diversion Race Management Limited)

## Appendix

### **Public notice: Call for submissions on the proposed National Environmental Standard on Ecological Flows and Water Levels**

*In accordance with section 44 of the Resource Management Act (1991) the Minister for the Environment gives notice of the Government's intention to develop a national environmental standard (regulations) on ecological flows and water levels.*

*The intent of the proposed national environmental standard is to promote consistency in the way decisions are made to ensure sufficient variability and quantity of water flowing in rivers, ground water systems, lakes, and wetlands.*

*The proposed standard is consistent with the purpose of the Resource Management Act 1991 to promote the sustainable management of natural and physical resources – in this case fresh water. It would do this by:*

- *Setting interim limits on the alterations to flows and/or water levels for rivers, wetland and groundwater systems that do not have limits imposed through regional plans.*
- *Providing a process for selecting the appropriate technical methods for evaluating ecological flows and water levels in rivers, lakes, wetland and groundwater systems.*

*A [discussion document outlining the subject matter and rationale of the proposed standard](#) has been produced by the Ministry for the Environment to assist people in making submissions. This document can be viewed at the Ministry for the Environment, 23 Kate Sheppard Place, Thorndon, Wellington and online at [www.mfe.govt.nz](http://www.mfe.govt.nz)*

*If you would like a printed copy of the discussion document, free copies are available by emailing your request to [orders@mfe.govt.nz](mailto:orders@mfe.govt.nz) or by phoning (04) 439 7527.*

*Any person can make a submission on the subject matter of the proposed standard. Please include the following information in your submission:*

1. *Your name, postal address, phone number, and email address (if applicable).*
2. *A statement that you are making a submission on the proposal to develop a national environmental standard on ecological flows and water levels.*
3. *Whether you support or oppose the proposal as detailed in the discussion document.*
4. *Your submission with reasons for your views.*
5. *Any changes you would like made to the proposed national environmental standard as detailed in the discussion document.*
6. *The decision you would like the Minister for the Environment to make.*

*Please send your submission by post to the Ministry for the Environment, PO Box 10362, Wellington, or by email to [standards@mfe.govt.nz](mailto:standards@mfe.govt.nz). Submissions must be received by 5 pm on Thursday, 31 July 2008. Now [extended](#) to 29th August 2008.*

*Note: The Ministry for the Environment has [scheduled workshops on the proposed standard starting on 26 May 2008 in 11 locations around New Zealand](#).*