

BEFORE THE INDEPENDENT HEARING COMMISSIONERS

UNDER the Resource Management Act
1991

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

**APPENDIX D
SUPPLEMENTARY LEGAL SUBMISSIONS**

13 June 2013

**ANDERSON LLOYD
LAWYERS
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QUESTIONS TO MS BAKER-GALLOWAY FROM HEARING GROUP 2**Q11. What is the status of the One Plan and the hybrid rule 13.1 it incorporates combining land use and water permits?**

1. The Manawatu-Wanganui Regional Council notified the Proposed One Plan ("POP") on 31 May 2007. The POP attracted a number of appeals. Most points of appeal were resolved before the Court hearing. The points of appeal that still required determination by the Court included provisions relating to surface water quality/ non-point source discharges.
2. In relation to the POP the Court has now ruled on all substantive matters in four decisions¹. The first decision dated 31 August 2012 is the substantive one. The three subsequent decisions dated 24 December 2012, 25 March 2013 and 9 May 2013 respectively address drafting details having directed and received additional submissions from the parties in respect of the same.
3. The One Plan's Rules 13-1 to 13-1C are the hybrid rules relevant to this question. These rules combine elements of s9 and s15 activities into one rule by controlling "*the use of land pursuant to section 9 (2) for....and any of the following discharges pursuant to ss 15 (1) or 15 (2A)...*" The Court in its 2nd, 3rd and 4th decisions approved the tracked changes versions of the One Plan provided by the Council, noting some exceptions requiring additional amendment.² No such exceptions requiring amendment related to the principle of using a hybrid rule for land use and discharges. The structure of the rules, and the fact they control both land use and associated discharges was not queried by the Court. Nor did it appear to be challenged by the parties – at least if it was it was not the subject of any detailed discussion and determination by the Court.

¹ *Day v Manawatu-Wanganui RC* [2012] NZEnvC 182 (*Day-182*) and *Day v Manawatu-Wanganui RC* [2012] NZEnvC 285 (*Day-285*), *Day v Manawatu-Wanganui RC* [2013] NZEnvC 45 and *Day v Manawatu-Wanganui RC* [2013] NZEnvC 98

² *Day-285*, at [115] page 34.

4. The One Plan decision has been appealed by Federated Farmers and Horticulture NZ. The appeals do not challenge, either directly or indirectly, the use of hybrid rules controlling land use and associated discharges.
5. Horticulture NZ had applied to the Environment Court for a rehearing but this was dismissed in *Day v Manawatu-Wanganui Regional Council* [2013] NZEnvC 44.

Q 12. Check the Waikato Variation 5 case to clarify whether bundling s9 and s15 activities into hybrid rules was considered unlawful, or just not preferred in that case.

6. *Carter Holt Harvey Ltd v Waikato Regional Council* ENC Auckland, A123/2008, 6 November 2008 discussed whether Proposed Variation 5 to the Waikato Regional Plan ("RPV5") could have hybrid rules. The Court was faced with the issue of whether the rules should be framed as land use rules, separate discharge rules or as land use and discharge rules.
7. The Court dealt with the appropriateness of making a hybrid rule. The Court observed:
[169] The matter is of some importance because of the different presumptions that apply to land use and discharge activities. This reflects sections 9 and 15 of the Act respectively. Land use activities are subject to a permissive presumption. A person may, as of right, carry out a land use activity unless it is restricted by a rule in a regional or district plan or a proposed plan. A discharge by any person is subject to a restrictive presumption. There can be no discharge without a consent or discharge permission.
8. The Court found that the discharge rules should be clearly differentiated from land use rules.³
9. However the reason for that finding was not the legality per se of a hybrid rule approach, but instead issues of merit deriving from the specific instances in that case. The Court found there would be difficulties associated with integrating the hybrid rule with the region

³ *Carter Holt Harvey Ltd v Waikato Regional Council EnvC Auckland*, A123/08, 6 November 2008 (*Carter Holt Harvey*) at [E (v)] page 5.

wide structure of the plan and other discharge rules, and the associated administrative difficulties for the processing of applications under that plan.⁴ That structural and administrative difficulty is not present either in the One Plan, nor in the LWRP, because these are not Variations that have to be retrofitted into an existing plan structure. They are complete Plans, and as such use of hybrid rules controlling the land use and discharge effects of farming in an integrated and efficient way are not only lawful, they are an effective way of achieving a good, sustainable outcome.

Q13. Is Fish and Game opposed in principle of the auditing of FEP, irrespective of rule status?

10. Fish and Game is not opposed in principle to the auditing of FEPs, however cannot see how in the context of a permitted activity rule for example, auditing could be used to achieve the requisite level of consistent, objective certification that clear requirements, conditions or permissions were being complied with.

Q14. Is there an exception in law for third party certification of permitted activity prerequisites in regional or district plan?

11. Under s87A(1) if an activity is described in a proposed plan as a permitted activity, a resource consent is not required for the activity "*if it complies with the requirements, conditions, and permissions, if any, specified*" in the proposed plan.
12. The key point to consider is whether it is lawful to use a certification process to illustrate compliance with the above requirements, conditions or permissions. As long as the manner in which certification is expressed does not result in the reservation of a level of discretion, it is submitted that the principle of using certification in the context of a permitted rule is not unlawful.
13. However, whether or not certification in a particular instance is unlawful will depend on the facts and the subject matter, and whether

⁴ *Carter Holt Harvey*, at [189] – [196] pages 63 – 66.

the requirements, conditions or permissions to be certified are capable of consistent, objective assessment, with no element of subjectivity or discretion. If the certification process allows for subjectivity or discretion, it is not a lawful permitted rule.

14. A Council may not delegate the power to make a decision on a resource consent according to section 34 A (2) (b), however this restriction on delegation is not extended to confirmation that an activity is a permitted activity. The use of third party certification in permitted activity rules is not explicitly addressed or excluded in the Act.

Q15. Did Mr Percy take into account case law which does not support use of term "bottom line" in context of section 5(2)(a)(b) and (c)?

15. There are cases that do not approve of the use of the phrase "bottom lines"⁵ in the context of section 5. It has been commented on as being a "catch phrase"⁶ and not expressing "lucidly and exactly the intent of the provisions"⁷. I acknowledge that use of the phrase "bottom lines" is not a phrase that has been approved by the Courts in respect of s5(2).
16. Abstaining from use of the phrase "bottom line" in the context of section 5 (2) (a) (b) and (c) does not change Fish and Game's interpretation that the enabling provisions of section 5 are constrained by, and must coexist with the purposes in subparagraphs (a), (b) and (c).⁸

⁵ *Mangakahia Maori Kimiti v Northland Regional Council* PT, A107/95, 14 November 1995 (*Mangakahia*) at page 46 and *New Zealand Royal Forest and Bird Protection Society Inc v Manawatu-Wanganui Regional Council* [1996] NZRMA 241 at page 269 (*Royal Forest and Bird*).

⁶ *Mangakahia*, page 46.

⁷ *Royal Forest and Bird*, page 269.

⁸ *Mangakahia* page 46 and *Day-182*, above n 1, at [5-215] page 5-76.

DATED this 13th day of June 2013

A handwritten signature in cursive script, appearing to read "M A Baker-Galloway".

M A Baker-Galloway

Counsel for Fish and Game