

Tabled @ Hearing 16 June 2015

BEFORE THE CANTERBURY REGIONAL COUNCIL

IN THE MATTER OF: the Resource Management Act 1991

AND

IN THE MATTER OF: a submission on the Proposed Canterbury Land and Water
Regional Plan Variation 2

**LEGAL SUBMISSIONS ON BEHALF OF
DIRECTOR-GENERAL OF CONSERVATION
Dated 16 June 2015**

Director-General of Conservation

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Legal Submissions on behalf of the Director-General of Conservation

The Following Matters are Respectfully Submitted:

INTRODUCTION

1. The Director-General of Conservation (the Director-General) both submitted (24 October 2014) and further submitted (30 January 2015) on the proposed Variation 2 to the Proposed Canterbury Land & Water Regional Plan – Section 13 Ashburton (Variation 2).
2. Variation 2 relates to the Hinds River /Hekeao plains area which covers the Hinds River /Hekeao catchment and the plains between the Rangitata and Hakatere/ Ashburton Rivers. In general the Director-General's submissions support Variation 2. However, the Director-General considers Variation 2 gives insufficient attention to the life supporting requirements for freshwater ecosystems and species in the Hinds/Hekeao plains area covered by Variation 2.
3. The Director-General sought some amendments to Variation 2 to better address section 6(c) of the Resource Management Act 1991 (the RMA), which requires the Canterbury Regional Council (the Council) as a decision-maker under the RMA to recognise and provide for as a matter of national importance: "*... the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna.*"
4. In particular, the Director-General seeks the existing Targeted Stream Augmentation (TSA) to 3 drains to safeguard freshwater ecosystems values in the catchment area covered by Variation 2, continue and be extended. As further covered in the evidence of Dr Nicholas Dunn for the Director-General dated 15 May 2015, TSA is a proven tool for protecting areas of significant habitat of indigenous fauna.

5. The Director-General also supports the introduction of Managed Aquifer recharge (MAR) to reduce nitrogen and other nutrient loads on the catchment to benefit freshwater ecosystems, although noting this method has yet to be proven.
6. The Director-General also sought the inclusion of non-regulatory methods in Variation 2. As discussed in the evidence of Pamela Anne Guest for the Director-General dated 15 May 2015, this is no longer pursued.

Outline of Legal Submissions

7. These submissions will cover the following matters:
 - 7.1. The functions of the Director-General and the Department of Conservation (the Department)
 - 7.2. The Council's function under section 30(1)(ga)
 - 7.3. Hazardous substances and the Department's weed control
 - 7.4. Freshwater Fisheries Regulations 1983
 - 7.5. Conclusion

Functions of the Director-General and the Department

8. The Director-General is the administrative head of the Department, and as such is the "person" who is able to make submissions under the Resource Management Act 1991 (RMA).
9. The functions of the Department are set out in section 6 of the Conservation Act 1987, and relevantly include:
 - (a) *to manage for conservation purposes, all land, and all other natural and historic resources, for the time being held under this Act, and all other land and natural and historic resources whose owner agrees with the Minister that they should be managed by the Department:*
 - (ab) *to preserve so far as is practicable all indigenous freshwater fisheries, and protect recreational freshwater fisheries and freshwater fish habitats:*
 - (b) *to advocate the conservation of natural and historic resources generally:*

...

(g) every other function conferred on it by any other enactment.

10. In relation to freshwater fisheries and the section 6(ab) function of the Department to preserve so far as practicable all indigenous freshwater fisheries etc, the Director-General's powers include to advocate the conservation of freshwater fisheries and aquatic life generally: section 53(3)(d) Conservation Act 1987.
11. The Conservation Act has, as might be expected, a more conservationist focus and this is reflected in its definitions of "freshwater", "freshwater fish" and "fishery" which differ from the RMA definitions of "fresh water", "fish" and "fisheries resource" (see Appendix 1).
12. I submit it is important to be aware of these differences in understanding the submissions and evidence presented on behalf of the Director-General.

The Council's function under section 30(1)(ga) RMA

13. The Council has a number of functions under section 30(1) in giving effect to the RMA. I submit its paragraph (ga) function is significant here:
(ga) the establishment, implementation, and review of objectives, policies, and methods for maintaining indigenous biological diversity
14. The Director-General's submission sought the expansion of the introduction to section 13 to include more detail on the history and indigenous biological diversity contained in the Hinds River/ Hekeao plains area. In my submission the recommended amendments in the Section 42A Report, while better than the original Variation 2, still do not go far enough to assist the Council in meeting this function.
15. As further detailed in the evidence of Ms Guest and Dr Dunn, an expanded introduction would better provide context and guidance for Variation 2 and meet Council's section 30(1)(ga) function.

Hazardous Substances and the Department's Weed Control

16. The Department manages public conservation land and natural and historic resources for conservation purposes. The purpose of "conservation" as defined in the Conservation Act may be broken into three parts as follows:

conservation means the preservation and protection of natural and historic resources for the purpose of:

- *maintaining their intrinsic values,*
- *providing for their appreciation and recreational enjoyment by the public, and*
- *safeguarding the options of future generations.*

17. In meeting these conservation purposes the Department undertakes pest and weed control on both public conservation land and adjoining land where appropriate. This enables natural resources, such as plants water and soil, to be preserved and protected for their intrinsic values and to safeguard options for the future.

18. As detailed in the evidence of Keith Briden for the Director-General dated 15 May 2015, the Environmental Protection Authority (EPA) has functions under the Hazardous Substances and New Organisms Act 1996 (HASNO Act) to set rules or "controls" for the safe use of hazardous substances including herbicides and agrichemicals.

19. "Controls" as defined in the HASNO Act will include any rules made in a regional plan under the RMA, as follows:

controls means any obligations or restrictions imposed on any hazardous substance or new organism, or on any person in relation to any hazardous substance or new organism, by this or any other Act or any regulations, rules, codes, or other documents made in accordance with the provisions of this or any other Act for the purposes of controlling the adverse effects of that substance or organism on people or the environment.

20. The Department is bound by the HASNO Act and its subordinate legislation: section 3(1).

21. The various Controls Regulations made under the HASNO Act include signage requirements for substances with toxic and ecotoxic impacts, such as herbicides, aimed at limiting the exposure of people or the environment to below levels where adverse effects may occur.
22. As further detailed in Mr Briden's evidence, the level of control for various herbicides differs according to the site where the herbicide is administered, with tighter conditions applying to static waterways where the herbicide may be expected to linger when compared with flowing water.
23. Use of herbicides and other pest controls is often weather dependent, with final decisions whether to apply or not being made on the day.
24. The HASNO Act sets out its relationship with other Acts, and in particular the RMA, in section 142 which relevantly states:

142 Relationship to other Acts

...

(2) *Every person exercising a power or function under the Resource Management Act 1991 relating to the storage, use, disposal, or transportation of any hazardous substance shall comply with the provisions of this Act and with regulations and notices of transfer made under this Act.*

(3) *Nothing in subsection (2) shall prevent any person lawfully imposing more stringent requirements on the storage, use, disposal, or transportation of any hazardous substance than may be required by or under this Act where such requirements are considered necessary by that person for the purposes of the Resource Management Act 1991.*

...

(6) *Any controls prescribed under any other Act for any hazardous substance shall not contravene the provisions of regulations made under sections 75 and 76 unless—*

(a) *there is a provision in that other Act that expressly provides that controls made under that other Act for specified purposes may contravene the provisions of regulations made under this Act; and*

(b) *the controls are made for the purposes provided for in that Act.*

25. The RMA does not contain an express provision providing for controls made under that Act to contravene regulations made under the HASNO Act.
26. The HASNO Act does provide for more stringent requirements to be imposed under the RMA for the use of hazardous substances, such as herbicides or “agricchemicals”, where this is considered necessary: section 142(3) above.
27. However, as Variation 2 would apply to the discharge of any “agricchemical” to surface water used within the area subject to it, in my submission it is unclear whether this would be “more stringent” than any Controls and conditions imposed by the EPA in relation to the use of particular herbicides in particular circumstances. If it is less stringent, in my submission the Rule as amended by Variation 2 must not apply as it would otherwise contravene the Controls made by regulations under sections 75 and 76 of the HASNO Act.
28. I submit the wording of the proposed Rule is simply too broad to be certain whether it would meet the necessary “more stringent” test under the HASNO Act. I submit this is better left to the relevant HASNO Controls Regulations and codes.

Freshwater Fisheries Regulations 1983

29. The Director-General makes decisions under the Freshwater Fisheries Regulations 1983 in relation to fish passage requirements for dam or diversion structures in natural rivers, streams or water.
30. The considerations for the Director-General under these regulations are more narrow and conservation-focussed than those for decision-makers under the RMA. The differing requirements sit alongside each other as noted in the case of *Re Auckland Regional Council* [2002] NZRMA 241 at [48] to [52].
31. As noted in Mr Dunn’s evidence, one of the matters of particular concern for the preservation of indigenous freshwater fisheries is that fish passage from any new dam or diversion structure is appropriate, and does not increase

prospects of predation. The Director-General has sought amendments to address this concern and which will also align Variation 2 with the Director-General's role under these regulations.

Conclusion

32. The Director-General now seeks amendments to Variation 2 as further set out in the evidence of Ms Guest, Dr Dunn and Mr Briden.

33. In my submission the amendments sought will address the Council's section 6(c) obligation as well as meeting its section 30(1)(ga) function to establish and implement objectives, policies and methods (including rules) to maintain indigenous biological diversity in the Hinds River/ Hekeao plains area.



Pene Williams, Senior Solicitor

Appendix

Conservation Act 1987, section 2 definitions:

fishery means 1 or more stocks or parts of stocks or 1 or more species of freshwater fish or aquatic life that can be treated as a unit for the purposes of conservation or management

freshwater means—

- (a) *all waters of rivers, streams, lakes, ponds, lagoons, wetlands, impoundments, canals, channels, watercourses, or other bodies of water whether naturally occurring or artificially made:*
- (b) *all waters of estuaries or coastal lagoons:*
- (c) *all other fresh or estuarine waters where freshwater fish indigenous to or introduced into New Zealand are found:*
- (d) *all waters in the mouth of every river or stream, and the mouth of every river and stream shall be deemed to include every outlet thereof and the seashore between those outlets and the waters of the sea or lying within a distance of 500 metres from any place where at low tide the waters of a river or stream meet the waters of the sea*

freshwater fish includes all species of finfish of the Classes Agnatha and Osteichthyes, and all shellfish of the Classes Mollusca and Crustacea, that must, at any time in the life history of the species, inhabit fresh water; and includes any part thereof and such finfish and shellfish that seasonally migrate into or out of freshwater

Resource Management Act 1991, section 2 definitions:

fish has the same meaning as in section 2(1) of the Fisheries Act 1996

fisheries resources has the same meaning as in section 2(1) of the Fisheries Act 1996

fresh water means all water except coastal water and geothermal water

coastal water means seawater within the outer limits of the territorial sea and includes—

- (a) *seawater with a substantial fresh water component; and*
- (b) *seawater in estuaries, fiords, inlets, harbours, or embayments*

[NB: “seawater” is not defined in the RMA]

Fisheries Act 1996, section 2(1) definitions:

fish includes all species of finfish and shellfish, at any stage of their life history, whether living or dead

fisheries resources means any 1 or more stocks or species of fish, aquatic life, or seaweed