Tabled at Hearing on 17 November 2015

BEFORE THE INDEPENDENT COMMISSIONERS AT CHRISTCHURCH

UNDER	the Resource Management Act 1991
IN THE MATTER	of Plan Change 3 to the Canterbury Land and Water Regional Plan

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SYNOPSIS OF LEGAL SUBMISSIONS FOR CENTRAL SOUTH ISLAND FISH AND GAME COUNCIL

17 November 2015

ANDERSON LLOYD
LAWYERS
QUEENSTOWN

Solicitor: M A Baker-Galloway

Level 2,
13 Camp Street,
PO Box 201,
QUEENSTOWN 9348
DX ZP95010
Tel 03 450 0700
Fax 03 450 0799

Introduction

1 Due to a late conflict between this hearing and an Environment Court mediation, these submissions are tabled summarising the key legal points Counsel considers relevant to assist the Commissioners. Counsel can be available at a later date to assist and discuss these points if required and apologies for the inconvenience.

STATUTORY FUNCTIONS OF FISH AND GAME

2 Central South Island Fish and Game is the statutory manager for sports fisheries and game birds in part of Canterbury from the south bank of the Rakaia River in the North, to Moeraki in the South. It has a statutory function "*to manage, maintain and enhance the sports fish and game bird resource in the recreational interests of anglers and hunters*", "*to represent the interests and aspirations of anglers and hunters in the statutory planning process*" and "*to advocate the interests of the [New Zealand Fish and Game] Council, including its interests in habitats*"[1]. As such it has been involved in numerous planning processes in Canterbury to achieve an appropriate management of freshwater resources. This has included submissions on variations to the Natural Resources Regional Plan ("NRRP"), involvement in the Canterbury Water Management Strategy ("CWMS"), the Regional Policy Statement ("RPS"), the National Policy Statement on Freshwater Management ("NPSFM"), the full proposed Land and Water Regional Plan ("pLWRP") and various water conservation order applications in Canterbury.

IMPROVEMENT OF WATER QUALITY

3 ECan and most parties accept there is now a requirement to restore degraded water bodies. The cases I cite below provide assistance, and show that consistently the Courts and Boards of Inquiry are finding in favour of the obligation of regional councils to maintain and restore water bodies to a healthy state.

4 Copies of these cases can be provided to the Commissioners if they do not have them to hand, on request.

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[1] Section 26Q Conservation Act 1987

5 In the case of One Plan, Judge Thompson's division of the Environment Court noted:

> *[5-8] We should immediately say also that we have little sympathy for the line of argument that we should defer taking decisive action in the field of improving water quality (or, at the very least halting its further decline) because ... the science is not sufficiently understood ... or that ... further analysis could give a more comprehensive process ... or similarly phrased excuses for maintaining more or less the status quo. We will never know all there is to know. But what we* ***undoubtedly do know is that in many parts of the region the quality of the natural water is degraded to the point of being not potable for humans or stock, unsafe for contact recreation, and its aquatic ecosystems range between sub-optimal and imperilled. We also know what is causing that decline, and we know how to stop it, and reverse it. To fail to take available and appropriate steps within the terms of the legislation just cited would be inexcusable.***[2]

6 More recent decisions support this theme. Judge Thompson's division has reiterated and clarified the legal position this year[3]:

> *[29] It is a function of every regional council to control the use of land to maintain and enhance the quality of water in water bodies and to control the discharges of contaminants into water. This function is not optional – it is something a regional council is required to do.*

> *[69] This [time lag for effects] lack of precise knowledge is not a reason to restrain from taking any step to try to maintain, and indeed improve the quality of the water in any acquirer. While maintaining water quality may be something of a moving target, the requirement is to strive for management practices that will prevent degradation, and to strive to ensure that quality is, at a minimum, maintained. That is a plain requirement of s30.*

> *[70] If historical causes of water quality lead to decline later, and are causes which cannot be foreseen or controlled then that will have to be*

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[2] *Day v Manawatu-Wanganui Regional Council* [2012] NZEnvC 182 at page 5-5 to 5-6

[3] *Ngati Kahungungu Iwi Inc v Hawkes Bay Regional Council* [2015] NZEnvC 50

dealt with at the time the quality decline is identified and its extent becomes known.

[71] The frequent use in the hierarchy of planning documents of terms such as enhancement , see s7 RMA, or improve, see objective A2 of the NPSFM, inherently recognise that there will be situations where, from whatever cause, water or other aspects of the environment may be degraded to some degree from their pristine states.

[73] What we can predict, and can, and should be planning for, by way of objectives and policies is the effect of current anthropogenic activities affecting waterbodies.

[74] Having a sub- optimal present is not an excuse for failing to strive for an optimal, or at least closer to optimal future.

[77] Not being able to remedy the poor practices of the past is not a good reason to allow the same errors to be made in the future...technology and best practice needs to be developed to maintain and where degraded, enhance the environment to ensure that the sustainability principles of the RMA are fulfilled.

[78] The possibility of an objective of maintenance or enhancement being partly unfulfilled is not an excuse for not trying at all.

7 Judge Smith's division concurs in another recent decision this year:[4]

[373] The [river] is degraded by human activities" "We conclude that the [river] is over-allocated because the regional documents provide a clear direction towards reduction of contaminants and enhancement. Further, the [river], through its interaction with the Tarawera River, is contributing to the reduction of health and mauri of that river. These compulsory values would seem to put the [river] clearly in the frame of the directives of the Freshwater Policy Statement for maintenance and enhancement.

[375] Further, there are the Regional Council's functions as set out in s30 RMA, the most relevant parts for current purposes, we set out here...This section indicates towards maintenance or improvement of all water bodies.

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[4] *Sustainable Matata v Bay of Plenty Regional Council* [2015] NZEnvC 90

[377] This raises the issue of cumulative effects and long term effects. Once we consider the primary objective to safeguard the life supporting capacity we conclude that maintenance at least must be assumed. Adding to an existing background level albeit degraded, will not achieve maintenance. By increasing the level of contamination of the [river], there is the potential for the overall input from this source to the Tarawera River to increase and therefore to have a negative impact on the river.

[381] If the suggestion is that the Freshwater Policy Statement provides some permit to drive to the bottom line, or a licence to pollute, then that concept is entirely rejected by the court.

8 The Ruataniwha proposal in the Tukituki Catchment faced similar difficulties and the Board of Inquiry decision mirrors the position of the Courts:[5]

[328] Where the quality of freshwater has been degraded by human activities to such an extent that OBJ TT1 is not being achieved, water quality should not be allowed to degrade further. Rather, water quality should be improved progressively over time so that OBJ TT1 is achievable by 2030 (the year by which the NPSFM is to be implemented).

[663] PC6 is intended to provide an integrated approach to the management of land use and water. Amongst other things it contains a minimum flow regime that is designed to sustain river ecosystems and in-stream values. Improved quality as a result of the nutrient approach in the plan will also sustain these values. The Board is satisfied that PC6 gives effect to the NPSFM by appropriately addressing freshwater ecology.

[808] The NPSFM requires overall water quality to be maintained or improved within a region. It also requires councils to safeguard the life-supporting capacity, ecosystem processes and indigenous species (including their associated ecosystems) of fresh water. Councils are also required to manage fresh water efficiently within set limits and to address over-allocation.

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[5] Tukituki Board of Inquiry final decision 18 June 2014

9 The Board's final decision in relation to the Tukituki is a useful summary. In particular it highlights the issues of single nutrient management and prefers dual nutrient management to safeguard life supporting capacity and ecosystem health, and it rejects the concept of setting nitrogen limits at toxicity[6].

> *[360] The single nutrient approach seems to involve a high level of risk. Dr Ausseil acknowledged that the general scientific position was 'clear' in that managing both nitrogen and phosphorus "is a more environmentally conservative approach and that in not doing so, that is, managing only one nutrient incurs a number of risks".*
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> *[372] And the Board is of the view that the relatively 'hands off' approach to the control of nitrogen currently proposed in PC6 would not give effect to the NPSFM, particularly the policy of establishing methods to avoid over-allocation.*
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> *[373] Under those circumstances the Board has concluded that the 'single nutrient' management approach in PC6, which is based on managing nitrogen for toxicity effects only, is unsustainable. A 'dual nutrient' management approach addressing both phosphorus and nitrogen is required.*

10 Maintaining and enhancing amenity values and the quality of the environment generally feeds directly into the s 5 requirement that people's cultural, social and economic wellbeing be enabled. The recreation, leisure and even businesses of people recreating are all reliant on the maintenance and enhancement of healthy water bodies.

11 The fact that enhancement of an environment degraded by historical actions is consistent with the purpose of the Act was made by the Court in J F Investments Limited v Queenstown Lakes District Council[7].

> *[28] The RMA does not regard the present Environment – being the sum of all environments – the best of all possible New Zealand's. Section 7 (f)'s reference to enhancement of the quality of the environment requires that improvements may be made in appropriate circumstances.* ***That is consistent with purpose of the Act which***

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[6] Final Report and Decisions of the Board of Inquiry into the Tukituki Catchment Proposal: Volume 1 of 3: Report and Decisions, 18 June 2014, at paragraphs 359 – 373 and 451 to 453.

[7] C 48/2006 at paragraph 28

***requires remedying of the adverse effect of activities, including past effects (of past activities).** For example air and water quality were in the past regarded as public goods, people could pollute water nearly (subject to the common law of nuisance) as much as they wished. It is clearly contemplated by section 7 (f) together with sections 5 (2)(a) to (c) of the RMA that improvements to air and water quality many be very desirable ends of resource management. The same applies to degraded land and related natural resources.*

12 Fish and Game supports ECan and other parties' positions that the current environment is clearly nowhere near "the best" it could be, and that a Plan that ensures **enhancement**, in accordance with those principles in section 7 is not only justified, but required.

National Policy Statement for Freshwater Management 2014

13 As noted in paragraphs 26 and 27 of Ms Christensen's evidence, Fish and Game accepts that due to Ecan's decision to stage implementation of the NPSFM 2014 to 2023/2024, there is no obligation on Plan Change 3 to give effect to the NPSFM. Full implementation of the NPSFM will require an additional plan change that follows the detailed community based processes set out in section C of the NPSFM. Fish and Game is very supportive of these processes and is actively involved, and will continue to be involved to ensure that the NPSFM is given full effect in the next plan change prior to 2023/2024.

SPECIFIC MATTER – Rules 15.5.12A, 15.5.13 and 15.5.14

14 In paragraph 75 of Ms Christensen's evidence she explains that Fish and Game query the lawfulness of these rules. The rules permit activities if consent is held for a discharge.

15 These rules permit activities if a consent is held for a discharge. Fish and Game submit that:

(a) A rule should not grant permitted activity status that is determined by whether or not another consent is held, nor deem that by virtue of holding a consent that it is being complied with or the impacts on freshwater from the activity are not breaching the requirements of section 15 of the Act;

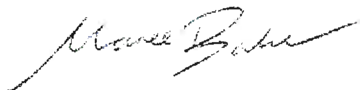
(b) These rules cannot require that the existing consent achieve certain outcomes, or be in accordance with this revised statutory

plan's requirements. Essentially this means the rules have no conditions controlling environmental effects.

(c) In *Queenstown Airport Corporation Ltd v Queenstown Lakes District Council* [2014] NZEnvC 93 the Environment Court considered whether the status of a permitted activity, or indeed any activity, could be determined by a prior grant of consent. In other words, could a rule in a plan require as a pre-condition to any development, the approval of a resource consent? It was submitted to the Court that it cannot have been Parliament's intention that a consent would prescribe the rules that are to apply to a consent granted for another activity. The Court concluded that the status of an activity derives from the Act and its subsidiary planning instruments and not from a resource consent. It found that rules were *ultra vires* the Act insofar as they required compliance with a resource consent which is not a standard, term or condition that was specified in the plan change.

> *[182] We struggle to understand how the classification of permitted activities can proceed from a grant of a resource consent. ...*
>
> *[183] ... under s 87A (or correctly s 77B) the status of an activity derives from the Act and its subsidiary planning instruments and not from a resource consent. In summary we find rules 12.19.1.1 and 12.20.3.2-4 are ultra vires s 77B of the Act insofar as the rules require compliance with a resource consent which is not a standard, term or condition that is specified in the plan change.*

(d) With respect it is submitted that this case should be carefully considered in terms of its implications for the rules in Plan Change 3.



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Maree Baker-Galloway

Counsel for Fish and Game