

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 - Plan
Change 4

LEGAL SUBMISSIONS ON BEHALF OF
DIRECTOR-GENERAL OF CONSERVATION

Dated 29 February 2016

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Legal Submissions for the Director-General of Conservation

Introduction

1. The Director-General of Conservation (the Director-General) submitted on proposed Variation 4 (now Plan Change 4) to the Canterbury Land and Water Regional Plan – otherwise known as the “Omnibus” plan change.
2. The Director-General is the administrative head of the Department of Conservation (DOC), and as such is the person who is able to make submissions under the Resource Management Act 1991 (RMA).
3. The matters on which the Director-General has submitted (the DOC Submission) include the following issues:
 - a) identification and protection of habitats of native freshwater fish;
 - b) discharges from drains;
 - c) small scale gravel extraction - disturbance of breeding birds;
 - d) discharge of wastewater from backcountry huts;
 - e) minimum flows for abstraction of water from small rivers and streams.
4. Expert evidence on the above matters has been prepared and provided to the Council. Unfortunately two of the expert witnesses for DOC, Mr Grant and Dr Dunn are unable to be present today, due to prior commitments. However, they have both offered to be available at an alternative suitable time if the panel has any questions to put to them.

Outline of Legal Submissions

5. These submissions will address the matters listed above and, where relevant, will discuss any legal issues related to the DOC submission.
6. The scope of plan change 4, and whether several of the matters in the DOC submission are ‘on’ the plan change has been raised as an issue in the officer’s report. I propose to address that question where relevant in relation to each submission point, as well as in general terms.

Whether submissions are on the plan change

7. In considering whether submissions are 'on' plan change 4 my submission is that the panel would be wrong to take too narrow a view of the scope of the plan change.
8. The test for being "on" a plan change was discussed in *Clearwater Resort Ltd v Christchurch City Council* High Court, Christchurch AP34/02 William Young J, 14 March 2003 (*Clearwater*). *Clearwater* established two limbs of a test for determining whether a submission is on a plan change; the first limb of the test involves assessing the extent to which the amendments alter the pre-existing status-quo, and the second limb is concerned with whether potentially interested parties have an opportunity to participate.
9. Relevantly to the first limb of the test in *Clearwater*, it is significant that Plan change 4 is wide ranging in its subject matter; it includes amendments to provisions dealing with a variety of issues. The plan change is not restricted to a particular geographical area, or to a confined issue.
10. The public notice stated that the changes proposed seek to "*address implementation issues and other resource management matters identified following the implementation of the Canterbury Land and Water Regional Plan*".
11. Consistently with the notified intention to address a variety of "*issues*" and "*matters*", Plan Change 4 is referred to as an Omnibus plan change. "*Omnibus*" means *pertaining to, including or dealing with numerous objects or items at once*. The use of that term reinforces the signalled intention in the plan change to alter the pre-existing status quo in respect of a variety of provisions.

12. In regard to the second limb of the test in *Clearwater*, the public notice is the starting point in assessing that any potentially interested submitters would have been alerted the wide ranging and varied nature of the issues and matters to be dealt with in the plan change. From the outset, it was clear that the intention in plan change 4 was that it would deal with a variety of issues and matters. Anyone reading the notice would have realised they would need to investigate further to understand what issues and matters were to be dealt with.
13. Furthermore, the public notice indicated changes to the planning maps were proposed, and it was clear Plan change 4 was not confined to a specific geographical area.
14. In my submission, when assessing whether submissions are 'on' Plan Change 4, the *Motor Machinists case (Palmerston North City Council v Motor Machinists Limited [2013] NZHC 1290)* is of limited utility and does not assist when applying the principles in *Clearwater* to the current circumstances.
15. In *Motor Machinists* the Court considered a plan change in which the Council had proposed to rezone specified parcels of land, within a defined geographic area. The issue was whether or not other parcels of land outside that geographical area could also be re-zoned. The identification of affected parties turned on the location of the relevant parcels of land, and there was a real concern that persons affected by additional rezoning would be 'left out in the cold' because they would have looked at a map and concluded the plan change did not affect them. The current situation can be distinguished from that in *Motor Machinists* because the geographic scope of the plan change is not a significant factor relevant to determining where it has effect.
16. Furthermore, unlike *Motor Machinists*, Plan Change 4 does not deal with a single category of activity or zoning in relation to a specific class of activity. Instead the "omnibus" nature of plan change 4, and the notified intention to address "implementation issues" and "resource management matters", made it

abundantly clear to potential submitters that this plan change was not narrowly confined. On the contrary, all the indications were that Plan Change 4 provided the opportunity to address any outstanding implementation issues or resource management matters.

17. DOC's submission deals with a range of matters. Plan Change 4 as notified included changes to provisions that deal with the matters addressed in the DOC submission. Those matters are discussed in more detail below.

Threatened fish species – Schedule 17 and maps

18. DOC's submission supports the inclusion of provisions for the protection of inanga/whitebait habitats, and seeks the addition of similar provisions for other threatened fish species.
19. DOC's submission on the provisions for freshwater fish is consistent with the functions of the Department, which are set out in section 6 of the Conservation Act 1987. The Department's functions include:
 - (a) *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:*
20. The focus of the Conservation Act is reflected in its definitions of "freshwater", "freshwater fish" and "fishery" which differ from the RMA definitions of "fresh water", "fish" and "fisheries resource".
21. From the Department's perspective, it is incongruous that the plan should include provisions for the protection of Inanga and their habitat, but not include similar provisions for the other more threatened indigenous fish species described by Dr Dunn, when those species are at risk and in need of protection from any further adverse effects including loss of their remaining habitat.

22. In my submission, the Council can best comply with its function in section 30(1)(ga) of the RMA, namely *“the establishment, implementation, and review of objectives, policies, and methods for maintaining indigenous biological diversity”* by including provisions for maintaining the habitat of all the indigenous fish species described by Dr Dunn.

Abstraction of water from small rivers and streams – the 50% rule in 5.123

23. The change proposed to rule 5.123 provides for the Council to estimate, rather than calculate, flow regimes for surface waterbodies.
24. DOC’s submission is that the minimum flow regime in rule 5.123 is far too low. The regime is a default regime that applies in the absence of any specific provisions, and is likely to apply in the case of smaller rivers and streams. As discussed by Mr Duncan in his evidence, allowing water abstraction resulting in river flows as low as 50% of the seven day mean annual low flow enables abstraction that would generate conditions similar to those that would only otherwise be experienced in extreme droughts.
25. The significance of the proposed change from ‘calculated’ flows to ‘estimated’ flows raises the possibility that residual flows left in rivers may be even less than 50% percent of the 7 day mean annual low flow. The actual amount will depend on CRC’s estimate. If the estimate is inaccurate, the residual flow left in the river could, in fact, be even lower than 50% of the 7 day mean annual low flow. If the plan is to enable decision making to be based on estimates, the uncertainties associated with relying on estimates need to be factored in, and a more cautious approach is required to ensure unsustainable adverse effects are avoided.
26. The reason given for the proposed change from a calculated to an estimated minimum flow is the lack of data on flows for many of the smaller rivers and streams. That uncertainty signifies that a conservative approach is necessary to ensure the life supporting capacity of the rivers and streams is maintained. The

lack of data combined with the extraordinarily low flow regime contemplated in the rule is not consistent with Policy 7.3.4(1)(c) of the Canterbury Regional Policy Statement, which states that surface water abstraction should be managed by establishing regimes which “*protect the flows ... required to safeguard the life supporting capacity, mauri, ecosystem processes and indigenous species including their associated ecosystem and protect the natural character values of fresh water bodies in the catchment...*”

27. The Canterbury Water Management Strategy (CWMS) is also relevant, as ECan must have regard to its vision and principles when considering a plan change. The lack of data, resulting in the proposed change from calculated to estimated flows, requires the application of Principle 2 of the CWMS, which states that a cautious approach is taken when information is uncertain, unreliable, or inadequate.
28. Principle 4 of the CWMS is also relevant. It states that ‘natural flow regimes of rivers are maintained’ and environmental flow regimes are established for every water way where abstraction occurs.
29. DOC’s submission is ‘on’ the plan change because both the plan change and DOC’s submission are concerned with the quantity of water that is left in water bodies. By relying on estimates, the plan change as notified introduces uncertainty about residual flows. DOC’s submission seeks higher residual flows, which, consistently with CWMS principle 2, would counter the risk that inaccurate estimates by the Council could result in unsustainably low flows.
30. In terms of the tests in *Clearwater*, the proposed change alters the pre-existing status quo by introducing uncertainty about the amount of water that may be left in rivers following the grant of consents. The change to the plan as notified was sufficient to signal to potential submitters the uncertainty introduced by reliance on estimates, and consequently the possibility of more or less water being left in waterbodies following the grant of consent. Any potentially interested submitter who read the notified plan change have had an

opportunity to consider the consequences of changing from calculated to estimated flows. In my submission it should come as no surprise to other interested parties that the uncertainty inherent in estimating flows should lead to a submission seeking a more cautionary approach to the residual flow regime.

Small scale Gravel extraction – rule 5.148 - bird breeding habitat

31. The Department's submissions on Policy 4.95A and Rules 5.148 to 5.150 relates to the effects of small scale gravel extraction on breeding birds. The plan appears to rely on people's ability to recognise and avoid breeding birds when extracting gravel from river and lake beds. However, as explained by Mr Grant in his evidence, any assumption that people will be able to identify and avoid breeding birds is misplaced, because the birds and their nests, eggs and young are inconspicuous.
32. The changes proposed to rule 5.148 as notified include new restrictions on the location and season in which gravel extraction may be undertaken as a permitted activity. My submission is that the additional amendments proposed by DOC do not depart significantly from the scope of the plan change as notified. The notified change signalled that the time periods in which the activity may be carried out as a permitted activity are in issue, and DOC's proposed further amendments to those time periods cannot be said to have come out of left field. Interested parties can reasonably be expected to have been alerted that time constraints on the permitted activity status of the activity are a live issue in the plan change.
33. Mr Grant's evidence describes the vulnerability of breeding birds to disturbance, and illustrates how difficult it is to identify their existence and the location of their nests, eggs and young. DOC's submission proposes a straightforward approach of only allowing small scale gravel extraction to occur outside the bird breeding season. An alternative option would be to make permitted activity status contingent on obtaining expert advice to locate and avoid nesting birds before commencing works. However, for small scale

activities that type requirement is likely to be out of proportion to the value of the activity, and a seasonal restriction on the activity is a reasonable compromise.

Identification of tile drains Rule 5.77

34. The Department's submission on rule 5.77 sought to ensure that the permitted activity rule for discharges from drainage systems is consistent with section 70 of the RMA.
35. Section 70 requires the council to be satisfied that none of the effects listed in section 70(1)(c) to (g) are likely to arise as a result of the discharge of a contaminant or water into water. The onus is on the Council; if the Council has not satisfied itself that discharges of drainage water are unlikely to cause:
- (c) any emission of objectionable odour; or
 - (d) the rendering of fresh water unsuitable for consumption by farm animals; or
 - (e) any significant adverse effects on aquatic life
- then the Council has no jurisdiction to include provisions in the regional plan making such discharges a permitted activity.
36. The officer's report at E.32 acknowledges a lack of certainty about the level of adverse effects on aquatic life. Where the Council has acknowledged such uncertainty exists about the effects of discharges on aquatic life, it has failed to comply with the requirement to satisfy itself that discharges are unlikely to cause any significant adverse effects on aquatic life, and a permitted activity rule allowing such discharges is contrary to section 70.

Rules 5.7 and 5.8: Discharge of wastewater from backcountry huts

37. DOC's submission regarding rules 5.7 and 5.8 seeks the inclusion of a rule that provides for the discharge of wastewater from backcountry huts.

38. In my submission, the inclusion of a proposed new rule 5.8A (as discussed in the section 42A report and subject to the further amendments in Mr Cock's and Mr Familton's evidence) is appropriate. As discussed in Mr Cock's evidence, discharges of wastewater from backcountry huts are small scale and often infrequent discharges of washing water by hut users. Such discharges are innocuous and unlikely to cause any adverse environmental effects. A decision to include new rule 5.8A, subject to the amendments discussed by Mr Familton, is reasonable and in my submission is within the jurisdiction of the decision-maker as it is on the plan change.
39. I acknowledge that at first glance the changes proposed to the plan as notified were not extensive - they include amendments to the definition of "wastewater", the deletion of "site" and its replacement with "property" and deletion of the word "domestic". However, the amendments as notified go further than simply correcting minor errors or introducing consequential changes; their effect is to change the application of the rules for wastewater disposal so that the provisions which previously only applied in the case of domestic wastewater disposal from a single site would now apply in a much broader range of situations, at different locations.
40. The notified changes to the plan were sufficient to signal a change in the regime for non-domestic wastewater disposal, and for wastewater disposal from properties other than domestic sites. The DOC submission responded to that change, because the notified changes materially altered the pre-existing status-quo with respect to wastewater discharges from backcountry huts.
41. In terms of the test for being "on" a plan change in *Clearwater* it is relevant that a consequence of the plan change is that the regime in rules 5.7 and 5.8 applies in respect of wastewater discharges from backcountry country huts. Previously that regime was only applicable to domestic wastewater and did not apply to backcountry huts, so it follows that all aspects of the regime are 'on' the plan change.

42. In regard to the second limb of the test in *Clearwater* (whether potentially interested parties have an opportunity to participate) DOC's submission on the plan change does not depart so significantly from the notified changes that it could be said the further provisions proposed have come out of '*left field*'. The effect of deleting the word 'domestic' results in the plan provisions being applicable to a potentially broad range of existing non-domestic wastewater treatment. It should come as no surprise to potentially interested parties that the provisions for domestic water discharge systems may not readily apply to other situations, and that as a result of its huts becoming subject to the rule DOC seeks an alternative.
43. Furthermore, in general backcountry huts are located in remote and isolated situations where there are no neighbouring landowners or occupiers that are likely to be directly affected as a result of any changes proposed. Therefore, in my submission, the second limb of the test in *Clearwater* is met and rule 5.8A can be introduced.

Conclusion

44. The Director-General now seeks amendments to plan change 4 as further set out in the evidence of Mr Familton. In my submission the amendments sought are available to be made as they can reasonably be considered to be on the plan change.

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