

Tabled @ Hearing
THURSDAY
17-03-2016
ERRALYN FARM

BEFORE INDEPENDENT HEARING COMMISSIONERS

UNDER the Resource Management Act 1991 and the Environment
Canterbury (Temporary Commissioners and Improved Water
Management) Act 2010

IN THE MATTER OF submissions and further submissions on Proposed Plan
Change 4 (Omnibus) to the partially operative Canterbury Land
and Water Regional Plan

**LEGAL SUBMISSIONS ON BEHALF OF ERRALYN FARM LIMITED
(SUBMITTER NO. 65926)**

DATED 17 MARCH 2016

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Introduction

- 1 These legal submissions are presented on behalf of Erralyn Farm Limited (**Erralyn**). Erralyn made a submission on Plan Change 4 (Submitter No. 65926).
- 2 Erralyn owns and operates a 270ha dairy farm east of Rakaia, which has a 2.5km boundary with the southern bank of the Rakaia River. Erralyn is therefore directly affected by changes proposed under Plan Change 4 (**PC4**) to the Canterbury Land and Water Regional Plan (**Regional Plan**) that place restrictions on the future use of land adjacent to the beds of braided rivers. It is for this reason that Erralyn made a submission on PC4.
- 3 Erralyn has refined its position on the matters raised in its submission following a review of Environment Canterbury's (**ECan's**) Section 42A Report and through the review of the other submitters' evidence. The legal submissions that follow focus on the residual issues of concern to Erralyn, which relate to:
 - 3.1 the proposed new definition of "bed" for braided rivers for the Regional Plan's stock exclusions rules under proposed Rule 5.68A; and
 - 3.2 new agricultural development (i.e. cultivation) under proposed Policy 4.85A and proposed Rules 5.163(9), 5.167(6) and 5.168(5).
- 4 Evidence in support of Erralyn's position will be given by Mr Errol Begg, a director of Erralyn. Mr Begg will provide an overview of Erralyn's farming and flood protection activities in so far as they relate to and/or affected by these aspects of PC4.

Stock Exclusion – Proposed Rule 5.68A

- 5 Erralyn supports ECan's intention to clarify the spatial extent of the term "bed" for the purposes of braided rivers in the Regional Plan's stock exclusion rules, Rules 5.68 to 5.71.
- 6 However, Erralyn is concerned that the proposed wording of Rule 5.68A would force intensive farming of stock within 50 metres of a braided river's outer margin into a non-complying activity status in circumstances where flood protection vegetation exists but is not "*owned or controlled by the Canterbury Regional Council*". It is submitted that in doing so the Rule unnecessarily disadvantages farmers who have had to invest in their own flood protection works to manage the risk of erosion and flooding of their land where ECan has been unable to carry out such works due to limited available resources.

7 Mr Begg will explain that Erralyn has invested approximately \$800,000 over the last 20 years in securing consents and (for the most part) carrying out its own flood protection works along the 2.5km boundary its property has with the Rakaia River. This is despite the fact that the property lies within ECan's Lower Rakaia River flood rating district and that Erralyn is presently (and has historically been) rated by ECan for flood protection purposes.

8 It is respectfully submitted that it is not necessary for proposed Rule 5.68A to distinguish between ECan and non-ECan owned or controlled flood protection vegetation. Doing so would be inconsistent with the approach adopted elsewhere in the Regional Plan. For example, region-wide Policy 4.91 simply provides :

Land uses, and other activities in the beds or margins of lakes and rivers, do not adversely affect the stability or functioning of lawfully established erosion control or flood protection works or infrastructure.

9 It is further submitted that such a distinction would not be necessary in order for the stock exclusion rules to implement the relevant policies, Policies 4.31 and 4.32, in terms of section 67(1) of the RMA. Those policies state:

Livestock Exclusion from Water Bodies

4.31 *Damage to the bed or banks of water bodies, sedimentation and disturbance of the waterbody, direct discharge of contaminants, and degradation of aquatic ecosystems is avoided by:*

(a) *excluding intensively farmed stock from lakes, rivers and wetlands; and*

(b) *excluding stock from swimming, salmon spawning and other sensitive waterbody areas and the waterbody bed and banks closely upstream of these areas; and*

(c) *limiting access to wetlands, and the banks or beds of lakes and rivers to stock species that prefer to avoid water and at stocking rates that avoid evident damage.*

4.32 *Adverse effects arising from stock access occurring under Policy 4.31(c) on water clarity and colour, bank stability, or riparian vegetation cover are minimised through the design and construction of stock crossing points and the management of stock grazing and stock movements across water bodies.*

10 Erralyn supports the approach proposed in the evidence of witnesses to be called by the Waitaki Irrigators Collective Limited, namely that the definition of river bed be amended by including non-ECan owned or controlled flood protection vegetation as the outer measuring point.

- 11 Erralyn respectfully submits that this could be achieved by Rule 5.68A referring to “*lawfully established flood protection vegetation*”,¹ and seeks the following amendment to Rule 5.68A:²

5.68A For the purposes of Rules 5.68 to 5.71 of this Plan:

1. *The bed (including the banks) of a braided river is limited to the wetted channels, any gravel islands, the gravel margins, and*
 - (1) the outer edge of any lawfully established flood protection vegetation owned or controlled by the CRC for flood protection purposes; or*
 - (2) where no lawfully established flood protection vegetation owned or controlled by the CRC exists, the lesser of:*
 - (a) the distance from the outer gravel margin to land that was cultivated or in crop or pasture on 5 September 2015; or*
 - (b) 50m either side of the outer gravel margin as measured on any given day.*
 2. *Any artificial lake is excluded, unless the artificial lake has been created as a result of the damming of a river; or the artificial lake discharges directly into a natural watercourse.*
- 12 The Reporting Officer appears to oppose this approach on the basis that the term “flood protection vegetation” is too ambiguous as it is not defined in the Regional Plan.³ And further that the inclusion of such a term would reduce certainty, but may increase the areas protected.⁴
- 13 With respect, the Regional Plan already makes reference to a similar term: *flood control vegetation*⁵ and that term is not defined. If there is concern that use of the term “*lawfully established flood protection vegetation*” in proposed Rule 5.68A would create ambiguity, the obvious solution would be to include a definition for it. This is within the scope of the submissions on PC4.⁶
- 14 A refinement of the following definition used in the former Natural Resources Regional Plan (Chapter 4) may be suitable:

¹ It is noted that in her Statement of Evidence dated 29 January 2016 Ms Soal for the Waitaki Irrigators Collective Limited also suggests the use of the term “defence against water” as a possible alternative (at para 11).

² Amendments sought by Erralyn are shown in underline (additions) and ~~striketrough~~ (deletions). Amendments recommended in the Section 42A Report are shown in **bold**.

³ Section 42A Report, page 138, at para L.21.

⁴ Ibid.

⁵ See for example Rule 5.163(1).

⁶ The submission by Waitaki Irrigators Collective Limited sought that a definition of “flood protection vegetation” be added to PC4 (Submission Point Id PC4 LWRP-252)..

Flood control vegetation means trees or shrubs planted for the purpose of defending against erosion of a riverbank, berm, or structure.

Cultivation – Proposed Policy 4.85A, Rules 5.163(9), 5.167(6) and 5.168(5)

- 15 Erralyn understands that the intention of the changes to proposed Policy 4.85A and proposed Rules 5.163(9), 5.167(6) and 5.168(5) is to restrict agricultural intensification within the beds of listed rivers (and their riparian margins) post 5 September 2015.⁷ The changes are deemed necessary as ECan believes agricultural intensification appears to be having cumulative effects on the functioning of braided river systems.⁸
- 16 Erralyn disputes this proposition in so far as the lower Rakaia River is concerned. The extract of the ECan Asset Management Plan⁹ attached to Mr Begg's evidence indicates that the functioning of the braided river system at that location has been influenced by flood protection works historically carried out by ECan and its predecessors. Specifically, the report records that land on the south side of the River – where Erralyn's farm is located – has historically experienced erosion problems as a result of those works. This is land that may otherwise have been available for agricultural development.
- 17 It is respectfully submitted that the Panel's consideration of the submissions on proposed Policy 4.85A and proposed Rules 5.163(9), 5.167(6) and 5.168(5) should be made with due regard to this wider context.
- 18 Erralyn's submission sought that there be no change to the policy and rule framework for vegetation clearance and earthworks. It continues to be Erralyn's preference that the changes proposed by PC4 to that framework be deleted.
- 19 The primary basis for Erralyn's opposition is that these provisions restrict the future development of freehold land, specifically land that has the benefit of irrigation consents which are yet to be implemented or exercised but would enable the cultivation of up to 20 ha of land within areas "protected" by proposed Rules 5.163(9), 5.167(6) and 5.168(5). It is submitted that such consents form part of the "environment" and should be able to be implemented or exercised in accordance with the conditions on which they were granted.
- 20 This proposition is supported by the recent decisions of *Shotover Park Limited v Queenstown Lakes District Council*¹⁰ and *Milford Centre Limited v Auckland*

⁷ Section 32 Report, page 49 – Option 2 – Amend the LWRP to restrict new agricultural intensification encroaching into the bed of the river.

⁸ Section 42A Report, page 101, at para H.51.

⁹ Rakaia River Rating District Asset Management Plan.

¹⁰ [2013] NZHC 1712.

*Council*¹¹. Those decisions apply the earlier Court of Appeal's decision in *Queenstown Lakes District Council v Hawthorn*¹², concerning the scope of the term 'environment' to which the inquiry in relation to resource consent applications under section 104 of the RMA is directed, in the context of plan changes.

21 In *Hawthorn*, the Court of Appeal confirmed that:¹³

...the term 'environment' embraces the future state of the environment as it might be modified by the utilisation of rights to carry out a permitted activity under a district plan. It also includes the environment as it might be modified by the implementation of resource consents which have been granted at the time a particular application has been considered, where it appears likely those consents will be implemented.

22 It is accepted that deletion of Policy 4.85A and proposed Rules 5.163(9), 5.167(6) and 5.168(5) is not necessary in order to address this specific issue. The outcome sought by Erralyn could be achieved by way of amendments to those provisions, or in the alternative, amendments to the definitions of "vegetation clearance" and "earthworks".

23 It is respectfully submitted that the simplest approach would be for the following (or similar) amendments to be made to the definitions:¹⁴

Earthworks	<p>Means the excavation of, and/or filling with topsoil, subsoil, sediments, rock and/or other underlying materials on which the soil is formed. Earthworks include, but are not limited to, the construction and maintenance of roads, tracks, firebreaks and landings, and ground shaping (recontouring), root raking and blading. Earthworks excludes:</p> <p>a. Cultivation of the soil on production land established, <u>or could be lawfully established in conjunction with irrigation authorised by a resource consent granted</u>, prior to 5 September 2015;</p>
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¹¹ [2014] NZEnv C 23.

¹² [2006] NZRMA 424.

¹³ *Ibid*, at [84].

¹⁴ Amendments sought by Erralyn are shown in underline (additions).

	...
Vegetation clearance	Means removal of vegetation by physical, mechanical, chemical or other means but excludes: a. Cultivation or harvesting of crops or pasture on production land established, <u>or could be lawfully established through irrigation authorised by a resource consent granted</u> , prior to 5 September 2015;
	...

Summary of Decisions Sought

- 24 Erralyn respectfully requests that 2.9 Definitions, Translations and Abbreviations and Rule 5.68A Stock Exclusion be amended as set out in these submissions and summarised in **Annexure A**.
- 25 It is submitted that these amendments would provide an appropriate and equitable planning framework for the reasonable use of freehold land adjacent to braided rivers.



GC Hamilton

Counsel for Erralyn Farm Limited

17 March 2016

ANNEXURE A – SUMMARY OF RELIEF SOUGHT BY ERRALYN FARM LIMITED

PROVISION OF PLAN CHANGE 4	RELIEF SOUGHT BY ERRALYN ¹⁵							
Definitions	Amend Section 2.9 Definitions, Translations and Abbreviations as follows: <table border="1" data-bbox="598 481 1412 1630"> <tr> <td data-bbox="598 481 858 1086">Earthworks</td> <td data-bbox="866 481 1412 1086"> Means the excavation of, and/or filling with topsoil, subsoil, sediments, rock and/or other underlying materials on which the soil is formed. Earthworks include, but are not limited to, the construction and maintenance of roads, tracks, firebreaks and landings, and ground shaping (recontouring), root raking and blading. Earthworks excludes: <p>a. Cultivation of the soil on production land established, <u>or could be lawfully established in conjunction with irrigation authorised by a resource consent granted</u>, prior to 5 September 2015; ...</p> </td> </tr> <tr> <td data-bbox="598 1093 858 1243"><u>Flood Protection Vegetation</u></td> <td data-bbox="866 1093 1412 1243"> <u>Means trees or shrubs planted for the purpose of defending against erosion of a riverbank, berm, or structure.</u> </td> </tr> <tr> <td data-bbox="598 1249 858 1630">Vegetation clearance</td> <td data-bbox="866 1249 1412 1630"> Means removal of vegetation by physical, mechanical, chemical or other means but excludes: <p>b. Cultivation or harvesting of crops or pasture on production land established, <u>or could be lawfully established through irrigation authorised by a resource consent granted</u>, prior to 5 September 2015;...</p> </td> </tr> </table>		Earthworks	Means the excavation of, and/or filling with topsoil, subsoil, sediments, rock and/or other underlying materials on which the soil is formed. Earthworks include, but are not limited to, the construction and maintenance of roads, tracks, firebreaks and landings, and ground shaping (recontouring), root raking and blading. Earthworks excludes: <p>a. Cultivation of the soil on production land established, <u>or could be lawfully established in conjunction with irrigation authorised by a resource consent granted</u>, prior to 5 September 2015; ...</p>	<u>Flood Protection Vegetation</u>	<u>Means trees or shrubs planted for the purpose of defending against erosion of a riverbank, berm, or structure.</u>	Vegetation clearance	Means removal of vegetation by physical, mechanical, chemical or other means but excludes: <p>b. Cultivation or harvesting of crops or pasture on production land established, <u>or could be lawfully established through irrigation authorised by a resource consent granted</u>, prior to 5 September 2015;...</p>
Earthworks	Means the excavation of, and/or filling with topsoil, subsoil, sediments, rock and/or other underlying materials on which the soil is formed. Earthworks include, but are not limited to, the construction and maintenance of roads, tracks, firebreaks and landings, and ground shaping (recontouring), root raking and blading. Earthworks excludes: <p>a. Cultivation of the soil on production land established, <u>or could be lawfully established in conjunction with irrigation authorised by a resource consent granted</u>, prior to 5 September 2015; ...</p>							
<u>Flood Protection Vegetation</u>	<u>Means trees or shrubs planted for the purpose of defending against erosion of a riverbank, berm, or structure.</u>							
Vegetation clearance	Means removal of vegetation by physical, mechanical, chemical or other means but excludes: <p>b. Cultivation or harvesting of crops or pasture on production land established, <u>or could be lawfully established through irrigation authorised by a resource consent granted</u>, prior to 5 September 2015;...</p>							
Proposed Rule 5.68A (Stock Exclusion)	Amend Rule 5.68A as follows: <p><i>5.68A For the purposes of Rules 5.68 to 5.71 of this Plan:</i></p> <p><i>1. The bed (including the banks) of a braided river is limited to the wetted channels, any gravel islands, the gravel margins, and</i></p> <p><i>(1) the outer edge of any <u>lawfully established flood protection vegetation owned or controlled by the CRC for flood protection purposes</u>; or</i></p> <p><i>(2) where no <u>lawfully established flood protection vegetation owned or controlled by the CRC exists</u>, the lesser of:</i></p> <p><i>(a) the distance from the outer gravel margin to land that was cultivated or in crop or pasture on 5 September 2015; or</i></p>							

¹⁵ The Decisions sought by Erralyn are shown in underline (additions) and ~~strike through~~ (deletions) as amendments to those recommended in the Section 42A Report (which are shown in **bold**).

	<p><i>(b) 50m either side of the outer gravel margin as measured on any given day.</i></p> <p><i>2. Any artificial lake is excluded, unless the artificial lake has been created as a result of the damming of a river; or the artificial lake discharges directly into a natural watercourse.</i></p>
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