

Tabled at Hearing Monday 2 May 2016

**BEFORE INDEPENDENT COMMISSIONERS**

**IN THE MATTER** of the Resource Management Act  
1991

**AND**

**IN THE MATTER** of Plan Change 3 to the  
Canterbury Land and Water  
Regional Plan

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**SUPPLEMENTARY LEGAL SUBMISSIONS OF CENTRAL SOUTH ISLAND  
FISH & GAME COUNCIL**

**04 MARCH 2016**

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## INTRODUCTION

1. These supplementary submissions for Central South Island Fish & Game Council ("Fish & Game") are in relation to proposed changes from Environment Canterbury ("ECan") to Plan Change 3 Canterbury Regional Land and Water Plan ("PC3") arising out of the caucusing process.
2. Fish & Game considers that, on the whole, the changes as currently proposed to PC3 provide a coherent and streamlined approach for sustainable management of freshwater outcomes. However it is submitted that further changes, as outlined in these submissions, are crucial in order to achieve certainty for future users of the Plan and in order to ensure that the Plan provides for the most efficient and effective means of achieving the objectives of the Plan. Fish & Game is in particular concerned that those provisions of PC3 which are the subject of these submissions do not give effect to the relevant higher order objectives and policies of the Plan, and in some instances appear internally inconsistent.
3. The particular proposed changes of concern to Fish & Game, which are the substance of these submissions, are summarised as follows;
  - a. The use of OVERSEER to set Nitrogen Leaching Flexibility and Maximum Cap limits without an assessment of those outcomes in terms of the water quality objectives of the Canterbury Regional Land and Water Plan ("Plan") and the update of those limits in an ad hoc manner without due process of a plan change and subsequent additional assessment of outcomes in terms of water quality;
  - b. Changes to Rules 15.5.3 and 15.5.3A which will provide for leaching above flexibility caps and grandparented rates as either a restricted discretionary or discretionary activity respectively, which does not provide sufficient protection to ensure specific freshwater quality objectives and outcomes set through the Plan are met, or water quality will at least be maintained.
  - c. Changes to the activity status of Rule 15.5.4 (where flexibility caps are exceeded) from 'prohibited' to 'non-complying' which

may result in leaching above flexibility caps and/ or grandparented rate.

4. Without the changes specified within these submissions, it is considered that PC3 will not achieve the purpose of the Resource Management Act ("the Act") and will not give effect to the National Policy Statement for Freshwater Management 2014 ("NPS").

#### **FLEXIBLE LIMITS**

5. There are two main issues of concern to Fish & Game with respect to the use of OVERSEER as proposed for PC3.
  - a. The first issues of concern, is that OVERSEER is not an appropriate tool to use to set Nitrogen Flexibility Cap, maximum cap, or load limits as it has not been used to produce an effects based result in terms of setting limits to achieve a desired freshwater objectives and therefore does not nor achieve the sustainable management of freshwater resources.
  - b. The second issue of concern is the anticipation and enablement in the plan of the use of new versions OVERSEER to update flexibility and maximum cap limits on an ongoing basis. This is *ultra vires*.
6. **The use of OVERSEER to set appropriate limits**
  - a. The determination of flexibility and maximum cap limits is set out through methods of determination appended to the plan.
  - b. Such a method allows for the definition of activity status using a moveable methodology. That methodology does not have regard to the higher order objectives and policies of the Plan, and therefore has the potential to result in limits and provisions which are internally inconstant within the Plan, and do not achieve overall enhancement and maintenance of freshwater.
  - c. The proposed catchment specific water quality limits and targets in Section 15 are set with the intention of achieving the Plan's freshwater objectives and in-stream freshwater outcomes described in Table 15(a) and 15(b). Flexible

determination of limits through a narrative assessment using OVERSEER, will however not achieve those outcomes.

- d. Fish & Game submits that the use of OVERSEER to set limits will result in plan inconsistency and the plan being undermined. Those outcomes set in 15(a) and 15(b) which must be given effect to by the lower order provisions of the plan will become redundant and serve no purpose. Accordingly it is submitted that the methodology of limit setting through OVERSEER is removed because it simply has not been shown on the basis proposed to have any connection to, or causal relationship with, the achievement of the instream concentrations and freshwater objectives.

**7. The use of new versions OVERSEER on an going basis is *ultra vires***

- a. Minute 7 makes it clear that the intention is to enable the limits in the plan to immediately update following the release of any new version of OVERSEER. This will require the remodeling of the existing limits, to estimate the equivalent N loss predicted under the new version of OVERSEER<sup>1</sup>. This comes as a result of the Minute 7 Caucus Report Draft where it is stated that rather than having to update the limits each time a new version of OVERSEER is released, that it would be appropriate for practical reasons to incorporate the updates to the S-Maps only when updating the limits subsequent to a release of a new version of OVERSEER<sup>2</sup>.
- b. And at paragraph 29 of Minute 7 it is quoted that;  

*"the planning caucus group agreed it is appropriate that the OVERSEER input files will sit outside of the plan and are to be incorporated by reference."*
- c. Because OVERSEER is incorporated by reference, it is part of the plan, and therefore replacements (subsequent versions)

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<sup>1</sup> Minute 7 Caucus Report Draft., paragraph 29.

<sup>2</sup> Minute 7 at paragraph 52

must occur through plan change/ variation otherwise the inclusion of replacements will be ultra vires.

8. The relevant parts of the Act which prescribe the use of material incorporated by reference in plan, and changes to such material is in clause 30 and 31 of Part 3, Schedule 1, and state as follows;
9. Clause 30 of part 3, Schedule 1 RMA allows material incorporated by reference into a plan:

***"30 Incorporation of documents by reference in plans and proposed plans***

*(1) The following written material may be incorporated by reference in a plan or proposed plan:*

*(a) standards, requirements, or recommended practices of international or national organisations:*

*(b) standards, requirements, or recommended practices prescribed in any country or jurisdiction:*

*(c) any other written material that deals with technical matters and is too large or impractical to include in, or print as part of, the plan or proposed plan.*

*(2) Material may be incorporated by reference in a plan or proposed plan—*

*(a) in whole or in part; and*

*(b) with modifications, additions, or variations specified in the plan or proposed plan.*

*(3) Material incorporated by reference in a plan or proposed plan has legal effect as part of the plan or proposed plan.*

***"31 Effect of amendments to, or replacement of, material incorporated by reference in plans and proposed plans***

*An amendment to, or replacement of, material incorporated by reference in a plan or proposed plan has legal effect as part of the plan or proposed plan only if—*

(a) a **variation** that has merged in and become part of the proposed plan under Part 1 states that the amendment or replacement has that effect; or

(b) an approved **change** made to the plan under Part 1 states that the amendment or replacement has that effect."

10. The Environment Court in *Day v Manawatu-Wanganui Regional Council*<sup>3</sup> explains these clauses as follows:

*"material can be incorporated, in whole or in part, and with specified modifications, additions, or variations. A plan change or variation is required to amend the material incorporated by reference, such as to introduce a new version (Clause 31)".*

11. The Environment Court ultimately went on however to consider that the context in which OVERSEER was referenced, meant that it was not in that instance material incorporated by reference.

12. Para 28 Minute 7 of the planning caucusing report states the following;

*"The planning caucus group agreed it is appropriate that the OVERSEER input files will sit outside of the plan and are to be incorporated by reference".*

13. It therefore appears clear that the intention of PC3 to incorporate by reference (a current version) of OVERSEER to the Plan, yet rely for the rules to ultimately be set in accordance with what will be a different (updated) version over time. It is submitted that this is the nub of the issue in PC3. In PC3 OVERSEER is considered material incorporated by reference because it is "written material that deals with technical matters and is too large or impractical to include" (clause 30(1)(c)). Any updates of OVERSEER in a plan must therefore be done through a formal plan change process in order to be lawful.

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<sup>3</sup> *Day v Manawatu-Wanganui Regional Council* [2012] NZEnvC 285 at 99

14. The provisions of PC3 referencing OVERSEER which are at issue are of a different nature to those that were considered acceptable in the Horizons proposed One Plan in the High Court appeal in *Horticulture New Zealand v Manawatu-Wanganui Regional Council* [2013] NZHC 2492<sup>4</sup>. In that case, the Court determined that where OVERSEER was used outside of the plan provisions, it did not require a specific version reference; it could instead be referred to generically. In that instance, the reference to OVERSEER was in the context of one possible available methodology to be used to prepare a 'nutrient management plan' which was a condition of consent. Importantly, that reference meant that the use of OVERSEER was not compelled by the Plan.
15. The key difference with that case, and the current PC3 provisions at issue, is that the PC3 provisions referencing OVERSEER will have a direct and authoritative role in the plan. That is to say that methodology schedules for the determination of flexibility and maximum caps require an assessment in accordance with the version of OVERSEER which is most recent. The outcome of such determination has an impact as to whether a rule is complied with or not in the Plan. In other words. To try and put it simply OVERSEER is used in PC3 to set "limits" whereas in the One Plan OVERSEER was just one tool which could be used to assess compliance with limits which were set to achieve water quality outcomes. In the Horizons One Plan, OVERSEER is a tool in toolbox to manage limits, whereas in the current version of PC3 it is being used to set limits. This is vastly different to a generic reference in the definition of a nutrient management plan which was an option for use, as accepted by the High Court.
16. This becomes a circular and uncertain exercise, as there is no definitive cap set, and the yardstick can be moved at different times. Accordingly, rules relying on the determination of caps set through the scheduled exercise of using the most recent version of OVERSEER are ultra vires.

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<sup>4</sup> *Horticulture New Zealand v Manawatu-Wanganui Regional Council* [2013] NZHC 2492 at 108 and 104

## OVERALL WATER QUALITY

17. It is submitted for Fish & Game that the ability for the leaching rates to change in relation to changes in OVERSEER, and rules which allow leaching above grandparented rates within PC3 are inconsistent with the requirements of the NPSFM, with the obligations under section 30 of the RMA, and inconsistent with recent Environment Court case law with respect to both of those matters. Although it is acknowledged that a staged implementation of the NPSFM does not require that it be given full effect to through PC3 at this stage, consideration of those provisions in the context of recent litigation is still relevant and are set out below. Where freshwater quality outcomes are being met, they must continue to be met.
18. The requirement to restore and protect degraded waterbodies has now been generally accepted as an obligation and function of local authorities.
19. The recent Environment Court case of *Ngāti Kahungunu Iwi Inc v The Hawkes Bay Regional Council* [2015] NZEnvC 50<sup>5</sup> is of assistance as it determined the applicability of the NPSFM 2014 in light of a local authority's obligations under section 30 RMA. The Court ultimately considered that there was an "unqualified function" imposed on regional councils in section 30(1)(c)(ii) of the RMA, to control the use of land for the purpose of "the maintenance and enhancement of the quality of water in water bodies,"<sup>6</sup> and the requirement in section 69 RMA that regional councils "shall not set standards in a plan which result, or may result, in a reduction of the quality of the water in any waters...unless it is consistent with the purpose of this Act to do so."<sup>7</sup>
20. For the Commissioner's assistance, the relevant provisions referred to above are set out below.

### **NPSFM 2014**

#### *Objective A1:*

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<sup>5</sup> *Ngāti Kahungunu Iwi Inc v The Hawkes Bay Regional Council*: [2015] NZEnvC 50

<sup>6</sup> *Ibid*, at 56

<sup>7</sup> *Ibid*, at 57



*"To safeguard:*

- a) The life-supporting capacity, ecosystem processes and indigenous species including their associated ecosystems, of fresh water; and*
- b) The health of people and communities, at least as affected by secondary contact with fresh water ..."*

*Objective A2:*

*"The overall quality of fresh water within a region is maintained or improved while:*

- a) protecting the significant values of outstanding freshwater bodies;*
- b) protecting the significant values of wetlands; and*
- c) improving the quality of fresh water in water bodies that have been degraded by human activities to the point of being over-allocated".*

**Section 30 RMA:**

*"30 Functions of regional councils under this Act*

*(1) Every regional council shall have the following functions for the purpose of giving effect to this Act in its region:*

- (a) The establishment, implementation, and review of objectives, policies, and methods to achieve integrated management of the natural and physical resources of the region:*
- (b) The preparation of objectives and policies in relation to any actual or potential effects of the use, development, or protection of land which are of regional significance:*
- (c) The control of the use of land for the purpose of-*
  - (i) Soil conservation:*

*(ii) The maintenance and enhancement of the quality of water in water bodies and coastal water: (emphasis added)*

*(iii) The maintenance of the quantity of water in water bodies and coastal water: ...*

*(f) The control of discharges of contaminants into or onto land, air, or water and discharges of water into water..."*

21. The Court in *Ngati Kahungunu* ultimately considered that Objective A1 of the NPSFM, (being to safeguard the life-supporting capacity, ecosystem processes and indigenous species including their associated ecosystems, of fresh water), was unequivocal. The following excerpts from that case are also helpful;

*"[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 - ie including water in aquifers, and to control the discharges of contaminants into water (again, including water in aquifers). This function is not optional - it is something a regional council is required to do, whether it be difficult or easy."*

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

22. The same findings were also made in the Environment Court in *Sustainable Matata v Bay of Plenty Regional Council* [2015] NZEnvC 90 by Judge Smith;

*"[277] Once we consider the primary objective to safeguard the life supporting capacity and sheet this home to Part 2 and the Regional Council's functions, we conclude that maintenance at least must be assumed. Adding to an existing background level albeit degraded, will not achieve maintenance."*

23. Amendments to the rules put forward through Council's section 42a report, and retained in the proposed rules provides for land uses to

increase leaching above grandparented rates and flexi caps as a RD activity (rule 15.5.3), and discretionary activity (rule 15.5.3A) are inconstant with the above obligations.

24. Rule 15.5.3 provides a pathway for individual farming activities to leach above flexible caps, grandparented rates, and maximum caps, (see in particular rules 15.5.2A waihao – Wainono plain area after augmentation and 5.5.2C Northern Streams Plains), and allows new farming activities to establish which leach above grandparented rates as long as they are within the maximum cap.
25. Those rules, in addition to being inconsistent with the bottom line requirement of Objective A2 of the NPSFM and section 30 will also likely not meet the sustainable management purpose of the Act within section 5. That purpose being to provide for people's cultural, social and economic wellbeing. Ensuring the maintenance and enhancement of water bodies is central to enabling the above section 5 matters.

**SPECIFIC MATTERS – Rules 15.5.3, 15.5.3A and 15.5.4 Rule 15.5.3 and 15.5.3A**

***Rule 15.5.3***

26. As notified, Rule 15.5.3 provided for increase in leaching from baseline in the Morven Sinclairs catchment as a restricted discretionary activity, and for existing farmers leaching above max caps to progressively reduce their leaching overtime.
27. As notified only farming activities which were within an irrigation scheme, nutrient user group, or enterprise were allowed to increase leaching above grandparented rates as long as they did not breach the max caps and the group were within the load limits set in table 15(p) in accordance with policy 5.4.10.
28. ECan then proposed (s42A officers report) that the rule be amended to also provide a pathway for individual farming activities in the Waihao – Wainono Area after augmentation and the Northern Streams Area to leach above their flexibility caps, and for new individual farming activities to leach above max caps .

### **Rule 15.5.3A**

29. New Rule 15.5.3A is proposed as follows;

***"The use of land for an individual farming activity that does not meet condition 1 of Rules 15.5.2A; 15.5.2B; 15.5.2D or 15.5.2E is a discretionary activity provided the following conditions are met:***

*1. The use of land is for an existing farming activity and the nitrogen loss calculation for the property lawfully exceeded the nitrogen loss per hectare per year permitted in accordance with condition 1 of Rules 15.5.2A, 15.5.2B or 15.5.2D prior to 24 April 2015; and*

*2. The use of land is for an existing farming activity and the nitrogen loss calculation for the property lawfully exceeded the nitrogen loss per hectare per year permitted in accordance with condition 1 of Rule 15.5.2E prior to 24 April 2015; and*

*3. A Farm Environment Plan has been prepared in accordance with Schedule 7 Part A, and is submitted with the application for resource consent".*

30. Fish & Game seeks that Rule 15.5.3A be deleted. This rule provides for existing farming activities to leach above grandparented rates. As discussed above, provision for leaching above grandparented rates is inconsistent with Council's obligations under section 5, and section 30 of the Act. Allowing an increase of leaching above grandparented rates where these are above the flexibility caps will not provide for the maintenance and enhancement of freshwater.

### **Rule 15.5.4 changes from 'prohibited' to non-complying activity status**

31. Rule 15.5.4 is proposed as follows;

***"The use of land for an individual farming activity that does not meet condition 1 of Rule 15.5.3 or condition 1 or 3 of Rule 15.5.3A is a non-complying activity"***

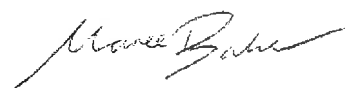
32. This rule only applies to farms which do not comply with the farm environment management plan requirements in accordance with

schedule A part A and is essentially the same as notified with the exception of the inclusion now of rule 15.5.3A.

33. Fish & Game seeks that this rule be deleted. The allowance for (non-complying) resource consents to now be applied for means the potential for future unacceptable discharges may occur.
34. Fish & Game submits that a rule should not provide for the ability for consent to be granted which will breach maximums and flexible cap limits set in the plan. If such consents were considered through the section 104D gateway test under the RMA, and eventually granted, this would result in future unacceptable degradation of water bodies which would undermine the integrity of the Plan.
35. The expert evidence of Ned Norton's (dated 5 February 2016) at paras 16-18 discusses the implications of the rule change in grandparented rates from prohibited to non-complying. The implications of this is that, as Ned points out, there is no guarantee that a consent will not be issued and therefore, the increase in catchment load (should a consent to increase leaching be granted) does not guarantee that Freshwater outcomes/objectives will be met.

## **CONCLUSION**

36. Fish & Game is happy to address the Commissioners on these submissions if that will assist in the final decision making process in respect of PC3.



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