

**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

**MEMORANDUM OF COUNSEL ON BEHALF OF
CENTRAL SOUTH ISLAND FISH AND GAME COUNCIL**

04 May 2016

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MAY IT PLEASE THE COMMISSIONERS:

- 1 This Memorandum of Counsel is on behalf of Central South Island Fish & Game ("**Fish and Game**") in respect of issues raised at Plan Change 3, Land and Water Regional Plan ("**PC 3**") Reply Hearing, dated 02-03 May 2016.

Use of OVERSEER in Permitted Activity Framework

- 2 Counsel for Fish and Game supported the legal submissions presented by Counsel for Council at the Reply Hearing regarding the legal requirements for permitted activity rules. Counsel referred to the submissions of Fish & Game presented in the parent plan (LWRP) hearing which concerned similar matters relating to permitted activity rules, although not specifically considering OVERSEER¹. The relevant extracts from those submissions are copied below;

"The law on permitted activity rules

[43] Under section 87A(1) if an activity is described in a proposed plan as a permitted activity, a resource consent is not required for the activity if it complies with the requirements, conditions, and permissions, if any, specified in the proposed plan.²

[44] For permitted activities it is necessary for any requirements, conditions and permissions to be stated with sufficient certainty such that compliance is able to be determined readily without reference to discretionary assessments.³ The rule should be comprehensible to a reasonably informed but not necessarily expert, reader.⁴ A permitted rule may not reserve by subjective formulation a discretion to decide whether an activity is a permitted activity.⁵ A farmer must be able to determine whether their intended activity is permitted or not without reference to a decision to be made by any third party.⁶ "

...

"[49] The definition of permitted activity requires that conditions, if any, must be "specified" in the plan⁷. This is so the Rule can be consistently interpreted and

¹ Submissions lodged on behalf of central South Island and North Canterbury Fish and Game Councils dated 09 May 2013 in respect of the Proposed Canterbury Land and Water Regional Plan and the use of Farm Environment Plans in permitted activities

² Section 87A Resource management Act 1991 ("RMA")

³ *Carter Holt Harvey Ltd and others v Waikato Regional Council ENC Auckland*, A123/2008, 6 November 2008, at [116]

⁴ *Re application by Lower Hutt City Council EnvC Wellington*, W046/07 31 May 2007 at [10], also submitted in *Carter Holt Harvey Ltd v Waikato Regional Council*, at [117]

⁵ *Twisted World Ltd v Wellington City Council EnvC Wellington*, W024/2002 8 July 2002 at [63] and *Ruddlesden v Kapiti Borough Council* (1986) 11 NZTPA 301, (1986) 6 NZAR 20 (HC) pg 27 also submitted in *Carter Holt Harvey Ltd v Waikato Regional Council*, at [117]

⁶ *Gordon and others v Wellington City Council*, CIV-2008-485-1191, 24 September 2008 at [25]

⁷ Section 87A(1) RMA

implemented by lay people without reference to council officers⁸, or any other third parties.⁹

...

[69] ... the One Plan decision ... is of particular assistance with regard to the fact it is difficult to impartially and consistently demonstrate compliance with the Overseer model under the permitted activity regime; managing N leaching in particular requires more interaction between a farmer and a council than a permitted activity rule would allow.¹⁰

- 3 Although the above submissions were prepared prior to the 'One Plan' appeals,¹¹ it is submitted that the above reasoning is still valid since the High Court's determinations on the One Plan did not overturn the Environment Court's reasoning on certainty of permitted activity rules.
- 4 Use of OVERSEER to specify a particular cap or 'limit' for nitrogen discharge is not appropriate in a permitted framework. OVERSEER is dependent on input accuracy and in order to use it effectively it is essential that the data is collected and inputted by a qualified accredited nutrient advisor.

High Court authority on permitted activity rules

- 5 The High Court determined that the Environment Court had not erred in its determination that the leachate management regime for commercial vegetable growing ought not be by way of a permitted activity rule. The Court upheld the reasoning of the Environment Court in respect of a permitted activity framework to manage nitrogen leaching, which has been referred to in footnote 11 of this Memorandum;

"[90] I do not think it can be said that the Environment Court erred in law in this respect. In [5-199] it examined at length reasons why a permitted activity rule would be inappropriate for dairy and intensive sheep and beef farming. Some 12 reasons were given. A number of those apply also to commercial vegetable growing, as the Court noted at [5-200]. Managing nitrogen leaching effectively would require significantly more interaction between local authority and farmer than a permitted activity would allow. The control of land use to identify water quality outcomes was best achieved by a consent identifying the metes and bounds of farming activity, available from inspection of public records. A resource consent provides greater certainty for a farm than permitted activity status (which can be changed). Another was s 70. It requires that before a rule can be included in a regional plan that allows, as a permitted activity, discharge of a contaminant into water, or onto land in circumstances where it may enter water, the Court must be satisfied that, after reasonable mixing, certain adverse

⁸ Submitted in *Carter Holt Harvey Ltd v Waikato Regional Council*, at [120]

⁹ *Gordon v Al-Sabak Investments Ltd* HC Wellington, at [25]

¹⁰ Referring paras [5-198]; [5-199]; [5-200] of *Day v Manawatu-Wanganui Regional Council* [2012] NZEnvC 182

¹¹ *Horticulture New Zealand v Manawatu-Wanganui Regional Council* [2013] NZHC 2492

*effects are unlikely to arise. Those effects include, under s 70(1)(g), “any significant adverse effects on aquatic life”. There was, the Court found, no evidential basis on which it could conclude that that high requirement would be met*¹².

- 6 In addition to the above High Court authority on the certainty required for permitted activity rules in the context of reliance on OVERSEER, the High Court cases of *Gordon* and *Ruddlesden* cited in this Memorandum helpfully discuss the broader principles of certainty and simplicity required in permitted activity rules.

Conclusion

- 7 Fish and Game support the addition of the controlled activity status for Rule 15.5.2E of PC 3 as it reduces some uncertainty associated with the previous narrative methodology for permitted activities resulting from caucusing.
- 8 There remains existing issues within permitted activities 15.5.2A-D based upon reasons of certainty, simplicity, and enforceability.



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¹² *Horticulture New Zealand v Manawatu-Wanganui Regional Council*, at [90]