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By email: plemiere@fedfarm.org.nz

Dear Paul:

Introduction

You have referred me to a document entitled "Caucusing statement in relation to nutrient management rule framework" dated 5 February 2016 ("the Caucusing Report"), and in particular to the definitions of flexibility cap and maximum cap and the updating thereof as per the methodology described in Schedule X and Schedule Y respectively, in line with version changes to OVERSEER. You have asked me whether a number of rules, including Rule 15.5.2, which refer to the flexibility cap and the maximum cap ("the Rules"), provide sufficient certainty for the rules to be cast as a permitted activity rules.

In addition to the Caucusing Statement, in preparing this opinion I have considered a document entitled "Proposed Plan Change 3 to the Canterbury Land and Water Regional Plan - Section 15 - Waitaki and South Coastal Canterbury - Version Showing Officer s42A Report Recommendations as red 'Tracked Changes'", dated April 2016 ("the Plan Change"), and a document entitled "Plan Change 3 to the Canterbury Land and Water Regional Plan - Officers Reply for Council Reply Hearing" dated April 2016 ("the Officer's Reply").

You have also asked that I comment on anything else that I might notice in the Officer's Reply.

You will appreciate that this advice has been prepared in some haste. I received some initial advice and instruction yesterday afternoon, and I understand that the Independent Commissioners considering the Plan Change want to receive any legal opinions on the matter by 5:00pm this evening.

My response follows.

Summary of Advice

1. The relevant law regarding permitted activity rules is set out accurately in the Officer's Reply, and refers appropriately to the leading cases in that respect.

2. However, that law is now somewhat dated, and some of the problems that have arisen with the regional plan provisions that resulted from the decisions in the leading cases is not discussed in the Officer's Reply. The controlled activity rules that derived from both decisions have proved problematic, which suggests that some reconsideration of the law surrounding permitted activity rules may be appropriate.

3. In relation to the "comprehensibility" and "not reserve discretion" tests, it is the Council itself which will be applying the methodology schedules and developing the entries to the relevant tables. In relation to the "certainty" test, developments in the requirements regarding references to external documents suggest that the test is not as applicable as it might once have been.

4. The Council's proposed Rule 15.5.2E could easily be cast as a permitted activity rule. It would seem that Matter 1 over which the Council reserves control, "The nitrogen loss rates to be applied to the property" is intended to result in words along the lines "the greater of the updated flexibility cap for the relevant area or the nitrogen baseline" as a condition on any resource consent that derives from the Rule, given that the intention of the Rule appears to be to provide flexibility in the nitrogen loss rates.

5. Yet the same legal principles that apply to a permitted activity rule are equally applicable to the conditions on a resource consent, once it is issued. So, if the flexibility condition is acceptable on a controlled activity rule, it must also be acceptable on a permitted activity rule.

6. Accordingly, in my opinion, the permitted activity rule and associated methodology, put forward as part of the Caucusing Report, is sufficiently certain to be valid as part of a permitted activity rule framework.

7. Further, it is my opinion that the Council's proposed Rule 15.5.2E in its version of the Plan Change, would be better if it was to be cast as a permitted activity rule.

Can the Rules be cast as Permitted Activity Rules?

8. At 8.176 - 8.183, the Officer's Reply sets out the "Factors relevant to the appropriateness of permitted activity rules". The law involved is set out accurately in the section, and refers appropriately to the leading cases in the matter.

9. However, the section does not record that the cases are now somewhat dated, with the *Carter Holt Harvey* decision[1] dating from 2008. Neither are any of the problems that have arisen with the regional plan provisions that resulted from the decisions discussed.

10. By way of example, the *Carter Holt Harvey* decision gave rise to the Lake Taupo variation, which regulates nutrients in the Lake Taupo catchment. The version of

[1] *Carter Holt Harvey Ltd v Waikato Regional Council,* Environment Court decision A123/08.

OVERSEER is fixed in the plan, and can be altered only by way of another plan change. The controlled activity rule was mainly concerned with the setting of benchmarks and discharge allowances, and now that that is done, the rule operates in effect as a permitted activity rule, with a set of conditions requiring compliance with the limits that have been set, and compliance with monitoring requirements. To date there have been no plan changes promulgated, and it would seem likely that both those landowners who have discharge allowances, and the environment itself, are being disadvantaged by the plan not being able to keep up with the developments that have taken place with OVERSEER.

11. The *Day* decisions[2] gave rise to the Horizons One-Plan. In that instance the rules specified generically that OVERSEER was to be used to set the relevant discharge allowances and to monitor compliance with those allowances. However, the applicable version of OVERSEER changed after the allowances were set, and the more recent version worked very differently from the former, and modelled very different outcomes, albeit that there was no change to the actual effects on the environment. While most landowners would have been able to comply had they been able to use the earlier version of OVERSEER to monitor their performance against the discharge allowances calculated using that earlier version, few, if any, land owners were able to comply with those discharge allowances when they were monitored using the later version. The upshot was that the Council developed an "implementation plan", whereby consent for farming activities was expected to be granted conditional on the use of "best practice" methods.

12. Perhaps the important point to take from this discussion is that in neither the Lake Taupo case nor the Horizons One-plan case has a satisfactory set of rules been developed. It is also worth noting that in both cases Federated Farmers put forward permitted activity rules for the respective Courts' consideration. In my opinion, all of this suggests that some reconsideration of the law surrounding the validity of permitted activity rules may be appropriate.

13. At 8.184 of the Officer's Reply the submission is made that the permitted activity rule and associated methodology, put forward as part of the Caucusing Report, is not sufficiently certain to be valid as part of a permitted activity rule framework. At 9.36 it is stated that, in the Officer's view, the permitted activity rule and its associated methodology schedules do not meet the all of the legal principles that apply to permitted activity rules. There follows an assessment of the permitted activity rules and methodology schedules against the legal principles for a permitted activity rule.

14. At 9.38(a), against the head that a permitted activity rule must be comprehensible to a reasonably informed, but not necessarily expert, person, it is stated that the permitted activity rules are comprehensible to a reasonably informed person, but it is noted that the methodology schedules in the Caucusing Report are of a technical nature, which will require someone with technical expertise to undertake the assessment. However, in practice, the methodology schedules will be applied by the Council, as is the case with the Council's version of the Plan Change, with the "reasonably informed person" required to comprehend no more than the resultant threshold or limit "number".

[2] *Day v Manawatu-Wanganui Regional Council* [2012] NZEnvC 182; and *Horticulture New Zealand v Manawatu-Wanganui Regional Council* [2013] NZHC 2492.

15. At 9.38(b), against the head that a permitted activity rule must not reserve to a council or a third party the discretion to decide by subjective formulation whether a proposed activity is permitted or not, it is stated that the methodology used in the Caucusing Report to update the limits requires the exercise of discretion by third parties. Again, in practice, the methodology will be applied by the Council, and there is no discretion as to the applicability of the resultant threshold or limit "number".

16. At 9.38(c), against the head that a permitted activity rule must be sufficiently certain to be capable of objective ascertainment, it is stated that the permitted activity rules and associated methodology schedules in the Caucusing Report are sufficiently certain to be capable of objective ascertainment, provided each new version of OVERSEER does not require any additional inputs that have not been defined in the existing input files. However, the Officer's Report goes on to state that, If a new version of OVERSEER does require a new input parameter in order for the model to run, the suitably qualified expert is required to determine an appropriate input in accordance with best practice guidelines, which, retains an element of discretion and subjectivity.

17. Part 3 of Schedule 1 to the Resource Management Act describes how external documents may be incorporated by reference into plans and proposed plans. The Part was enacted in 2005, and since that time increasing use has been made in local authority plans of the ability to include such things as "standards, requirements, or recommended practices of international or national organisations"[3] or "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".[4] Reference is often made, in performance standards in permitted activity rules, of the need to comply with such material. For example, Permitted Activity Rule H4.10.2.1.3, Control 3, of the Proposed Auckland Unitary Plan requires that "The storage, use and disposal of fertiliser must be in accordance with the Code of Nutrient Management (2007)".

18. It is submitted that the methodology schedules in both the Caucusing Report and the Council's version of the Plan Change are very much akin to external documents, and indeed they could easily be formulated as external documents, which would qualify as "… 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". It would be illogical that reference could be made to external material as a valid condition on a permitted activity rule, when the same material which happened to be included within a permitted activity rule would be considered invalid because, for example, it lacked sufficiently certainty to be capable of objective ascertainment.

19. Accordingly, it is respectfully submitted that, while the legal principles remain applicable, the weighting to be attributed to them has become less that it was when the appropriate tests were formulated, in favour of a pragmatic approach being taken to making practical plans that are workable.

20. Turning, by way of example, to the Council's proposed Rule 15.5.2E in its version of the Plan Change, it is submitted that the Rule could easily be cast as a permitted activity rule. It would seem that Matter 1 over which the Council reserves control, "The nitrogen loss rates to be applied to the property" is intended to result in words along the lines "the greater of the updated flexibility cap for the relevant area or the nitrogen baseline" as a

[3] Resource Management Act, Schedule 1, Part 3, cl 30(1)(a).
[4] Ibid, cl 30(1)(c).

condition on any resource consent that derives from the Rule, given that the intention of the Rule appears to be to provide flexibility in the nitrogen loss rates.[5] Yet the same legal principles that apply to a permitted activity rule are equally applicable to the conditions on a resource consent, once it is issued. So, if the flexibility condition is acceptable on a controlled activity rule, it must also be acceptable on a permitted activity rule.

21. Matters 2 & 3 over which the Council reserves control, of the Council's proposed Rule 15.5.2E, can also readily be recast into performance standards on a permitted activity rule. Indeed, as regards Matter 3, it is difficult to see how the condition on a resource consent will be anything other than a requirement to comply with the good management practices in Schedule 24b, as is the case for the Council's proposed Permitted Activity rules, such as Rule 15.5.2.

22. Accordingly, in my opinion, the permitted activity rule and associated methodology, put forward as part of the Caucusing Report, is sufficiently certain to be valid as part of a permitted activity rule framework. Further, it is my opinion that the Council's proposed Rule 15.5.2E in its version of the Plan Change, would be better if it was to be cast as a permitted activity rule.

Other matters - RMA s 14(3)(b)

23. I have not had the time to read through the Officer's Report thoroughly, but the discussion on RMA s 14(3)(b) in 8.84 - 8.114 caught my eye, and I take the opportunity to make some brief comments on that discussion.

24. In my opinion s 14(3)(b) protects a long standing right for individuals to take water for their animals' reasonable drinking water needs. The right derives from the common law, and at one stage was protected in s 21 of the Water and Soil Conservation Act 1967. As such, the provision will stand as providing authority for the taking and use of water, irrespective of any controls in regional plans which might appear to act as a constraint on that right. It is nevertheless acknowledged that the right is not unconstrained, in that such a taking or use must not, or must not be likely to, have an adverse effect on the environment.

25. As regards the use of the word "individual" in the provision, as opposed to the use of the word "person", is also my opinion that there will always be a natural person who is in charge of animals. In that sense, the term "individual's animals" can be seen as referring to the animals an individual is in charge of, as opposed to the animals an individual owns. It would be uncommon, to say the least, for a person responsible for managing animals such as manager of a dairy herd, not to be a natural person, as seems to be the proposition advanced at 8.92 of the Officer's Reply.

[5] At 8.185 of the Officer's Reply, it is stated that the Council's proposed rule is based on:
… incorporating [the rule framework proposed in the Caucusing Report] addressing Overseer version changes into a consenting framework.

Conclusion

26. I have concluded that the updating of flexibility and maximum caps in line with OVERSEER version changes, as per the methodology in the Caucusing Report, provides sufficient certainty for the updating to be by way of a permitted activity rule. Likewise, and for similar reasons, the Council's controlled activity rule should also be cast as a permitted activity rule.

27. Please contact me if you need any further information in relation to this advice.

Yours sincerely

Richard Gardner
Solicitor