

**BEFORE THE INDEPENDENT HEARING COMMISSIONERS APPOINTED
BY THE CANTERBURY REGIONAL COUNCIL**

IN THE MATTER OF of the Resource Management Act 1991

AND

IN THE MATTER OF Submissions and further submissions by Opuha
Water Limited on Proposed Plan Change 5 to the
Canterbury Land and Water Regional Plan

LEGAL SUBMISSIONS ON BEHALF OF OPUHA WATER LIMITED

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MAY IT PLEASE THE COMMISSIONERS:

- 1 These submissions on proposed Plan Change 5 (PC5) to the Canterbury Land and Water Regional Plan (LWRP) are presented on behalf of Opuha Water Limited (Opuha).

Introduction

- 2 Opuha owns and manages the Opuha Dam which releases water into the Opuha River. Irrigation takes associated with the scheme are from the Opuha, Opihi and Te Ngawai Rivers. Irrigation water is abstracted directly from the Rivers by approximately 70 individual consent holders across the Scheme area. Another approximately 170 irrigators are supplied water via four sub-schemes (Levels Plain, Kakahu, Totara Valley, Sutherlands) which comprise networks of water races, channels and pipelines to distribute water.
- 3 Opuha is 100% owned by farmer-shareholders. Approximately 30 shareholders farm in the Red Nutrient Allocation Zone (Red Zone), abstracting 20% of the water available for irrigation. The remaining 210 shareholders farm in the Orange Zone, abstracting 80%.
- 4 Opuha water is fully allocated to shareholders. As a consequence, to increase the amount of land irrigated within the scheme, shareholders must buy/lease shares from other shareholders and/or change to more efficient systems. In the latter case, shareholders can make their water go further through either system changes or better management. The result is that Opuha can only expand as a scheme where water efficiencies occur.
- 5 Opuha is in the Orari-Temuka-Opihi-Pareora (OTOP) catchment. The OTOP sub-regional rules are due to be notified in June 2018. Until then, Opuha and its shareholders will be subject to the PC5 provisions.

Other Relief being pursued

- 6 Opuha has taken heed of the evidence and submissions presented by other primary sector participants. For efficiency, it has chosen to confine its case to addressing only a few of its requests, although it

maintains an interest in most of its original submission points. In particular:

- 6.1 Opuha submitted on the winter grazing definition¹, seeking the same amendment proposed by DairyNZ in its submission². Opuha continues to support DairyNZ's proposed definition as recommended by, and for the reasons set out in, the Section 42A Report (**s42A Report**)³;
- 6.2 Opuha submitted to retain the notified definition of *principal water supplier*⁴. Opuha supports the proposed definition as recommended by, and for the reasons set out in, the s42A Report⁵;
- 6.3 Opuha submitted to retain the notified Policy 4.38E concerning phosphorus losses⁶. Opuha supports the proposed amendments as recommended by, and for the reasons set out in, the s42A Report⁷;
- 6.4 Opuha submitted to delete the words "authorised to be" from Conditions 2 and 3 of the Red Zone permitted activity rule (Rule 5.44A)⁸. This amendment would remove drafting inconsistency between that Rule and the equivalent Orange Zone rule (Rule 5.54A). Opuha supports the deletion to Condition 2 as recommended by the Officer's in their Revised version of Part A of PC5⁹, and continues to seek the same deletion in Condition 3, for the sake of clarity and consistency in wording;
- 6.5 Opuha recognises the Farm Portal will have a significant effect on its farmer shareholders. Opuha supports the efforts of other submitters to ensure the Farm Portal is able to deliver on its

¹ Opuha Submission on PC5, dated 11 March 2016, at page 8

² DairyNZ Submission on PC5, dated 11 March 2016, at page 35

³ Section 42A Report, page 105, at 7.222; Revised Appendix I - Part A of the Section 42A Report, 17 August 2016, at page 3-3

⁴ Opuha Submission on PC5, dated 11 March 2016, at page 10

⁵ Section 42A Report, page 110, at 7.251; Revised Appendix I - Part A of the Section 42A Report, 17 August 2016, at page 3-3

⁶ Opuha Submission on PC5, dated 11 March 2016, at page 10

⁷ Section 42A Report, page 173, at 8.259; Revised Appendix I - Part A of the Section 42A Report, 17 August 2016, at page 5-5

⁸ Opuha Submission on PC5, dated 11 March 2016, at pages 7 and 8

⁹ Revised Appendix I - Part A of the Section 42A Report, 17 August 2016

objective – namely, that a farm operating at Good Management Practice will be able to "match" the Portal-derived loss rate.

- 7 In evidence, Opuha focussed on the following aspects of its submission:
- 7.1 The qualifications and experience necessary for Accredited Farm Consultant status;
 - 7.2 Lawful exceedances available to farming activities should also be available to irrigation schemes; and
 - 7.3 The definition of winter grazing (Opuha's continued support for this submission point is addressed at paragraph 6.1 above).
- 8 In rebuttal evidence, Opuha focussed on the joint evidence for North Canterbury and Central South Island Fish and Game Council (**Fish and Game**)¹⁰, concerning:
- 8.1 Permitted thresholds for irrigation in the Orange Zone; and
 - 8.2 Permitted thresholds for winter grazing in both Red and Orange Zones.
- 9 These submissions focus on those aspects of Opuha's requested relief and evidence at paragraphs 7.1 and 7.2, and 8.1 and 8.2 above.

Principal Relief being Pursued

- 10 Opuha's primary concern remains achieving an appropriate framework for its shareholders in the Red and Orange zones.
- 11 Opuha therefore requests the following relief:
- 11.1 With reference to the definition of *Accredited Farm Consultant (AFC)*:
 - (a) Retain Rules 5.44B, 5.54B and 5.57C, provided the rules continue to provide controlled status where FEPs

¹⁰ Evidence of Scott Pearson and Angela Christensen for North Canterbury and Central South Island Fish and Game Councils, dated 21 July 2016

have only been reviewed by (but not prepared by) an AFC; and, ideally

- (b) Amend (b) of the definition so the CE of ECan can approve those considered to be suitably experienced, as well as qualified.

11.2 Amend Policy 4.41C so an irrigation scheme may be granted consent to discharge N above the Baseline GMP Loss Rate if the nitrogen baseline was lawfully exceeded prior to 13 February 2016;

11.3 Retain the recommended permitted activity threshold for irrigation in the Orange Zone, without restrictions on increases; and

11.4 Retain the recommended winter grazing permitted activity thresholds for both Red and Orange Zones.

Accredited Farm Consultants

- 12 Opuha has proactively sought to develop FEPs with its shareholders. To date, Opuha has 100 FEPs from its 240 shareholders. The FEPs are focussed on Opuha's larger shareholders, being those farms irrigating more than 50ha¹¹.
- 13 Opuha has undertaken development of its shareholders' FEPs in accordance with the LWRP. In her evidence Ms Crossman explains why Opuha is confident in the calibre and robustness of the FEPs developed so far:
- 13.1 They use Opuha's ECan-approved template; and
- 13.2 They have been developed by staff and/or consultants who are qualified and experienced – including through having local knowledge¹².
- 14 Despite this Ms Crossman notes that only one of those persons might meet the AFC definition as recommended by the Officers – depending

¹¹ Evidence of Julia Crossman for Opuha, dated 22 July 2016, at paragraph 19

¹² Evidence of Julia Crossman for Opuha, dated 22 July 2016, at paragraphs 20 to 25

on whether the CE approves that person's qualification (being a Bachelor of Commerce in Agriculture majoring in Farm Management) under (b) of the definition¹³.

- 15 The recommended controlled activity rules in Red, Orange and Green and Light Blue Zones (Rules 5.44B(3), 5.54B(3) and 5.57C(3) respectively) require a FEP to have been prepared or reviewed by an AFC. In its original submission, Opuha sought amendments to Condition 3 in each of those rules to either¹⁴:
- 15.1 Remove it as a Condition and insert it as a Matter over which the Regional Council reserves control; or
- 15.2 Add the words "or suitably experienced person" after "Accredited Farm Consultant".
- 16 On further consideration Opuha has accepted, despite the extra costs involved, both the scheme and its shareholders would benefit from having the completed FEPs reviewed and the certainty it provides¹⁵.
- 17 Opuha can therefore accept the Rules as recommended, provided the option for FEPs to be reviewed (but not prepared) by an AFC is retained¹⁶. This is currently provided for by the words *...has been prepared or reviewed by...* in Condition 3 of each of the controlled activity rules and Policy 4.41A(c).
- 18 Opuha remains concerned, however, that the definition of AFC unduly restricts the pool of people who qualify as an AFC¹⁷. To this end, Opuha's preference would be to obtain some sort of amendment so that a FEP can be prepared or reviewed by someone with suitable experience, not just qualifications.
- 19 This was the intent of Opuha 's original request to amend each of the controlled activity conditions.

¹³ Evidence of Julia Crossman for Opuha, dated 22 July 2016, at paragraph 20

¹⁴ Submission by OPUHA, dated 11 March 2016, pages 5 to 7

¹⁵ Evidence of Julia Crossman for Opuha, dated 22 July 2016, at paragraph 27

¹⁶ Rules 5.44B and 5.54B

¹⁷ Evidence of Julia Crossman for Opuha, dated 22 July 2016, at paragraph 29

Scope

- 20 It is submitted there is scope for the Panel to grant Opuha 's request through an amendment to the definition of AFC as follows (Officer's recommendations shown in red, Opuha's requested amendments shown in blue):

Means a person ~~that~~ who holds a Certificate of Completion in Advanced Sustainable Nutrient Management in New Zealand Agriculture from Massey University; and who

- a. *Has been certified by the New Zealand Institute for Primary Industry Management as meeting the criteria for a 'Certified Dairy farm System Consultant; or*
 - b. *Holds any other qualification or experience that has been approved by the Chief Executive of Environment Canterbury, as being an equivalent standard with respect to the knowledge and competencies required.*
- 21 It is submitted such amendment would have the same effect as Opuha's original submission on Policy 4.41A(c) and the three controlled activity rules¹⁸ because the requirement for an AFC does not appear anywhere else in the region-wide rules. It does, however, appear in the Waitaki sub-regional Rules¹⁹. If this is seen as an impediment to changing the definition, Opuha would be content with its original requested change to the relevant rules.

Lawful Exceedances

- 22 In its original submission, Opuha requested an amendment to Policy 4.41C so an irrigation scheme may obtain a permit to discharge beyond the Baseline GMP Loss Rate for land within its scheme, if the nitrogen baseline had been lawfully exceeded prior to February 2016²⁰.

¹⁸ Lake Zones do not have a controlled activity pathway

¹⁹ Rules 15B.5.15, 15B.5.19, 15B.5.25, 15B.5.34

²⁰ Submission by Opuha, dated 11 March 2016, at pages 2 and 3

- 23 In evidence Ms Crossman discusses why the lawful exceedances submission point is significant to Opuha and its shareholders²¹. In summary,
- 23.1 Approximately 80% of Opuha's shareholders farm in the Orange Zone²²;
- 23.2 The LWRP rules previously allowed some intensification beyond baselines in the Orange zone²³; and
- 23.3 Ms Crossman gives examples to illustrate why Opuha expects some shareholders will have lawfully exceeded their baselines before now²⁴.
- 24 Under PC5, consents granted to schemes shall be limited to the aggregate Baseline GMP Loss Rate²⁵. In contrast, the Regional Council is able to consent a higher loss rate for individual farming activities where the nitrogen baseline was lawfully exceeded prior to February 2016²⁶.
- 25 Opuha submits the different approach to individual farming activities, as compared with schemes or enterprises, is inequitable.
- 26 For Opuha it begs the question: why would shareholders want their scheme to obtain a consent for N discharges when they might in fact end up with less than they would otherwise? Opuha submits the different approaches could act as a disincentive to scheme consents. It is submitted this is contrary to LWRP Policy 4.36, which encourages schemes to facilitate the consenting of their constituent farms²⁷.
- 27 Under Opuha's proposed amendments, schemes, enterprises and individuals would be equally eligible for consented discharges exceeding Baseline GMP Loss Rates. It is submitted there would be no adverse effect on environmental outcomes as a result because

²¹ Evidence of Julia Crossman for Opuha, dated 22 July 2016, at paragraphs 31 to 33 and 42 to 43

²² Evidence of Julia Crossman for Opuha, dated 22 July 2016, at paragraph 12

²³ Rules 5.54 and 5.55 LWRP - Until 1 January 2016, Orange Zone farming activities could, as a permitted activity, increase their nitrogen loss above their nitrogen baseline by up to 5 kg per hectare per annum, and, from 1 January 2016, could, as a restricted discretionary activity, increase their nitrogen loss above their nitrogen baseline by up to 5 kg per hectare per annum.

²⁴ Evidence of Julia Crossman for Opuha, dated 22 July 2016, at paragraphs 40 to 41

²⁵ Policy 4.41C(b)(i)

²⁶ Policy 4.38A

²⁷ Policy 4.36(c) LWRP

farmers could pursue individual consents rather than accept lesser loss rates.

Proposed wording of Policy 4.41C

- 28 As outlined in paragraph 25 above, Opuha submitted on Policy 4.41C in its original submission. This submission point was not discussed in the s42A Report, though similar submissions were²⁸. The Officer's concluded provision for previously consented N loss in the policy would *weaken the policy position such that the provisions will no longer meet the Council's obligations set out in Objective A2 of the NPSFM*²⁹. Opuha submits that position is inconsistent with the provision for lawful exceedances to individual farming activities throughout PC5.
- 29 Opuha made equivalent requests in respect of Rules 5.46A, 5.56AA and 5.58B for farming enterprises³⁰ and the s42A Report did discuss these requests. The s42A Report acknowledged the requested changes "had merit"³¹, however considered the proposed wording did not adequately limit exceedances to those which were lawful³².
- 30 In an effort to satisfy the concerns expressed, Opuha has refined its relief. The changes sought now limit total consentable N loss to the lesser of the GMP Loss Rate or the N loss calculation that occurred in the baseline period prior to 13 February 2016 (in the same way Policy 4.38A(b) does).
- 31 Opuha's proposed wording to that effect was produced in Ms Crossman's evidence³³ and is reproduced in **Appendix 1** of these submissions for ease of reference.
- 32 This leaves the issue of Rules. Opuha originally submitted on the farming enterprise rules, principally because it could see no planning rationale for a difference in approach to individual farms, farming enterprises and schemes. As presently proposed, a farming

²⁸ Section 42A Report, page 107, at 7.227-7.232

²⁹ Section 42A Report, page 109, at 7.243

³⁰ Submission of Opuha, dated 11 March 2016, at pages 9 and 10

³¹ Section 42A Report, page 121, at 7.291

³² Section 42A Report, page 121, at 7.291

³³ Evidence of Julia Crossman for Opuha, dated 22 July 2016, at paragraph 45

enterprise that proposes a higher N loss rate than the Baseline GMP Rate is prohibited in the red zone³⁴ and non-complying in the orange, green and light blue zones³⁵.

- 33 On the other hand, a scheme is governed by Rule 5.62 and is discretionary regardless of whether the load exceeds the Baseline GMP load or not. However, Policy 4.41C is of particular relevance to applications made under Rule 5.62.

Irrigation Increases in the Orange Zone

- 34 It is understood Fish and Game seeks a 10ha restriction on increasing irrigation in the Orange Zone, up to the proposed 50ha. This would make the Orange Zone rule equivalent to the notified Red Zone rule that restricts increases to irrigated area.
- 35 Opuha opposed the Fish and Game request on Condition 2 of Rule 5.54A in its further submission³⁶ and in the rebuttal evidence of Ms Crossman³⁷.
- 36 ECan undertook a number of modelling scenarios to explore various options for altering the irrigation threshold and/or the increases available in Red and Orange zones³⁸.
- 37 Fish and Game's requested 10ha restriction on permitted increases up to 50ha was not modelled³⁹. Fish and Game's evidence states *the difference...would be significant*.⁴⁰ However, this is unsupported by any technical analysis. Ms Crossman's evidence disputes this proposition with particular reference to the circumstances of the Opuha Scheme⁴¹.
- 38 Opuha therefore remains concerned the restrictions sought by Fish and Game would unnecessarily restrict Opuha's shareholders from

³⁴ Rule 5.48A

³⁵ Rules 5.56AB and 5.58B

³⁶ Further Submission of Opuha (13 May 2015) at paragraphs 9 and 15

³⁷ Rebuttal Evidence of Julia Crossman for Opuha, dated 5 August 2016, at paragraphs 17 to 24

³⁸ Section 42A Report, Appendix C – North, H., Lilburne, L., Robson, M. – Assessing the potential implications of proposed Plan Change 5 rules for Nitrogen Loss.

³⁹ Section 42A Report, Appendix C, page 36; Evidence of Scott Pearson and Angela Christensen for Fish and Game, dated 22 July 2016, at paragraph 53

⁴⁰ Evidence of Scott Pearson and Angela Christensen for Fish and Game, dated 22 July 2016, at paragraph 51

⁴¹ Rebuttal Evidence of Julia Crossman for Opuha, dated 5 August 2016, at paragraphs 17 to 24

increasing their irrigated area. Fish and Game's rebuttal evidence does not address this effects-based opposition – it simply disputes whether or not the 10Ha cap would dis-incentivise efficiency improvements⁴².

Winter Grazing Thresholds and Increases in the Red and Orange Zones

- 39 It is understood Fish and Game seeks to restrict winter grazing in Red and Orange Zones to:
- 39.1 The lesser of either 10% of the property or 20ha (Red Zone) / 50ha (Orange Zone); and
- 39.2 No more than 10ha above what was winter grazed at February 2016.
- 40 At present PC5 restricts permitted winter grazing to 20ha.
- 41 Modelling of various scenarios altering the winter grazing threshold and/or increases available in Red and Orange zones was undertaken in preparation of the s42A Report⁴³. The authors conceded the modelling only accounted for the biophysical feasibility of intensification (whether winter grazing or irrigation) on those properties and did not consider *whether such intensification is likely from a lifestyle, economic or motivation point of view*⁴⁴.
- 42 The Officer's commented that the scenarios modelling winter grazing of the lesser of 10% of farm area or 50ha/100ha resulted in similar N loss to the notified 20ha threshold⁴⁵. In their view *the 'gain' comes from effectively disallowing wintering on small properties, while being more enabling on larger properties*⁴⁶. However the Officers were hesitant to make a recommendation without considering the evidence from submitters on the modelling undertaken and the potential equity shift⁴⁷.

⁴² Rebuttal Evidence of Scott Pearson and Angela Christensen for Fish and Game, dated 5 August 2016, at paragraphs 18 and 19

⁴³ Section 42 Report, Appendix C – North, H., Lilburne, L., Robson, M. – Assessing the potential implications of proposed Plan Change 5 rules for Nitrogen Loss.

⁴⁴ Section 42A Report, Appendix C, at page 39.

⁴⁵ Section 42A Report, page 71, at 7.55 and 7.56

⁴⁶ Section 42A Report, page 71, at 7.56

⁴⁷ Section 42A Report, page 71, at 7.58

- 43 Ms Crossman anticipates the introduction of a 10% threshold will result in *unders and overs, although more restriction than enablement overall*⁴⁸. As a result Opuha prefers the 20 ha limit.
- 44 Opuha 's principal concern is with Fish and Game's request for a 10ha 'cap' above what was winter grazed at February 2016. Ms Crossman deposes this does not allow for⁴⁹:
- 44.1 The sporadic nature of winter grazing, particularly in light of the recent fluctuations in dairy grazing due to the low dairy pay out; and
- 44.2 The risk management advantages winter grazing can bring to a farm that experiences a downturn in its primary farm use.
- 45 Opuha therefore anticipates there will be shareholders who would be negatively impacted by Fish and Game's 'cap', because they have either not, in recent years, winter grazed as much area as they typically would, or have not previously winter grazed at all. Opuha therefore seeks to retain the Red and Orange Zone permitted activity thresholds for winter grazing as recommended by the Officers.

Conclusion

- 46 OPUHA seeks to avoid unnecessary and expensive duplication regarding quality-assurance of its shareholders' FEPs. It supports the words *...has been prepared or reviewed by...* in the proposed provisions⁵⁰. Ideally, Opuha would like to see the pool of available AFC's extended by providing potential for *suitably experienced* persons to also be approved by the CE of ECan.
- 47 Not allowing N loss rates that include previously **lawful** exceedances would unduly disadvantage those operating under a scheme consent. Opuha seeks changes so that its shareholders might obtain the same N loss rate through the scheme as individually.

⁴⁸ Rebuttal Evidence of Julia Crossman for Opuha, dated 5 August 2016, at paragraph 25

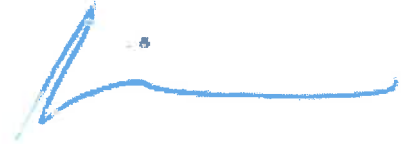
⁴⁹ Rebuttal Evidence of Julia Crossman for Opuha, dated 5 August 2016, at paragraphs 27 to 29

⁵⁰ Policy 4.41A(c); Rules 5.44B, 5.54B and 5.57C

- 48 Opuha opposes the amendments requested by Fish & Game regarding the permitted activity thresholds and increases for winter grazing and irrigation.

Evidence called

- 49 In support of its case Opuha calls evidence from Julia Crossman.

A handwritten signature in blue ink, consisting of a stylized initial 'A' followed by a long horizontal stroke.

Alanya Limmer/Johanna King
Counsel for Opuha Water Limited

Appendix 1 – Proposed Amendments to Policy 4.41C

Officer's recommendations shown in red, Opuha proposed amendments shown in blue.

4.41C Maintain water quality in Orange, Green and Light Blue Nutrient Allocation Zones, and improve water quality in Red Nutrient Allocation Zones and Lake Zones by requiring:

(a) any application for resource consent for the discharge of nutrients submitted by an irrigation scheme or principal water supplier to describe the methods that will be used to implement the ~~Good Management Practices~~ ~~on any land that will be supplied with water from the scheme or principal water supplier; and~~

(b) discharge permits granted to irrigation schemes or principal water suppliers to be subject to conditions that restrict the total nitrogen loss to a limit not exceeding:

(i) the Baseline GMP Loss Rate for any land within the Red, Lake or Orange Nutrient Allocation Zones unless the nitrogen baseline has been lawfully exceeded prior to 13 February 2016 in which case the nitrogen loss limit may exceed the Baseline GMP Loss Rate provided:

1. The application contains evidence the exceedance(s) was lawful; and

2. The nitrogen loss limit remains below the lesser of the Good Management Practice Loss Rate or the nitrogen loss calculation that occurred in the four years prior to 13 February 2016; and

(ii) a total of 5kg/ha/yr above the Baseline GMP loss rate for any land within the Green or Light Blue Allocation Zones.

Comment [A1]: We note the revised provisions (post-17 August 2016) label (b) as sub-paragraph (a) instead of (b). We have corrected this typographical error Opuha's preferred version.

Comment [A2]: These words are essentially the same as those in Policy 4.38A, which is the equivalent policy for individual consent applications.

Comment [A3]: We note Opuha did seek the same relief for the Green or Light Blue zones as its scheme is not affected the framework for these zones.