

IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV - 2010 - 409 - 2610
CIV 2010

Under the Resource Management Act 1991

In the matter of an appeal under s66 of the Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010

Between HURUNUI WATER PROJECT LTD, a duly incorporated company with its registered office at 127 Armagh Street, Christchurch.
Appellant

And THE CANTERBURY REGIONAL COUNCIL, of 58 Kilmore Street, Christchurch, a Regional Authority under Schedule 2 of the Local Government Act 2002
Respondent

**NOTICE OF APPEAL UNDER S66 OF THE ENVIRONMENT CANTERBURY
(TEMPORARY COMMISSIONERS AND IMPROVED WATER MANAGEMENT) ACT
2010**

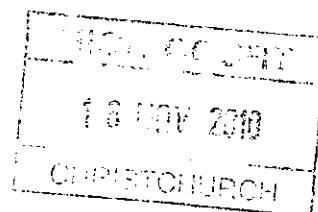
16 NOVEMBER 2010

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Judicial Officer

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To The Registrar of the High Court at Christchurch
and
To The Canterbury Regional Council

This document notifies you that:

1. On the 15th day of DECEMBER 2010 at 9.30 am/~~pm~~ or as soon thereafter as counsel may be heard, the appellant will move the High Court at Christchurch by way of appeal against part of the decision of the Canterbury Regional Council dated 5 October 2010 and issued on 23 October 2010, being a decision on the Natural Resources Regional Plan (NRRP), Chapter 5, Variations 1 and 2, in which the Council determined provisions relating to high naturalness water bodies.
2. Hurunui Community Water Development Project Working Group was a working group established to assess water augmentation possibilities on the Hurunui River. Hurunui Water Project Limited is the successor to that group with respect to the submissions lodged by the Hurunui Community Water Development Project Working Group.
 - A. **The Canterbury Regional Council made the following errors of law:**
 1. The Canterbury Regional Council failed to satisfy the correct legal test for the imposition of a prohibited activity status.
 2. The Canterbury Regional Council failed to undertake a proper s 32 evaluation of the options available to it and a proper cost benefit analysis prior to determining the imposition of a prohibited activity status for any damming on a high naturalness water body listed in Table WQN18 and a non complying activity status for any damming on a high naturalness water body listed in Table WQN16.
 3. There was no information/evidence before the Canterbury Regional Council which was reasonably capable of supporting the inclusion of the following waterbodies in Schedule WQ5 such that damming should become a non complying or prohibited activity:
 - 3.1 The Hurunui River mainstem from above the Mandamus River confluence (at or about M33:736-238) to the Lake Sumner outlet (at or

about M32:506-314) and the Mandamus River mainstem within Table WQN18.

- 3.2 The Hurunui and Mandamus Rivers from the Mandamus River confluence (at or about M33:736 – 238) to the headwaters within Table WQN16.
- 3.3 The Hurunui River (and tributaries) within Policy WQN1.
4. In formulating plan provision 5.4.1.1; Policy WQN1; Rule WQN25 and Schedule WQN5 the Canterbury Regional Council failed to have particular regard to the vision and principles of the Canterbury Water Management Strategy (CWMS) as required by section 63 of the Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010.
5. In formulating plan provision 5.4.1.1; Policy WQN1; Rule WQN25 and Schedule WQN5 the Canterbury Regional Council failed to give effect to the Canterbury Regional Policy Statement as required by section 67(3) of the Resource Management Act 1991.
6. In formulating plan provision 5.4.1.1; Policy WQN1; Rule WQN25 and Schedule WQN5 the Canterbury Regional Council erred in exercising a preference to section 6 matters above section 5 which is contrary to the judicial interpretation of Part 2 of the Act. The Variations were therefore not prepared in accordance with the provisions of Part 2 as required by section 66 of the Resource Management Act 1991.
7. The Canterbury Regional Council erred in finding that the LTCCP is the operative document to promote water storage options and augmentation projects, rather than the NRRP, and in doing so failed to prepare the change in accordance with the provisions of Part 2 as required by section 66 of the Resource Management Act 1991.
8. Rule WQN25 does not implement Policy WQN1 as required by section 68 of the Resource Management Act 1991.
9. Plan provision 5.4.1.1 and Policy WQN1 are void for uncertainty in that the terms “full flow” and “no significant adverse effect” are not defined.

10. The use of the phrase “no significant adverse effect” is contrary to section 104D of the Resource Management Act 1991 in that it imports a test regarding the level of effect into both gateway tests.
11. In formulating rule WQN25 the Canterbury Regional Council did not have particular regard to the actual or potential effects on the environment of damming activities as required by section 68(3) of the Resource Management Act 1991.

B. The questions of law to be resolved:

1. Did the Council satisfy the correct legal test for the imposition of prohibited activity status in Rule WQN25?
2. Did the Canterbury Regional Council undertake a proper s 32 evaluation of the options available to it and a proper cost benefit analysis prior to determining the imposition of a prohibited activity status for any damming on a high naturalness water body listed in Table WQN18 and a non complying activity status for any damming on a high naturalness water body listed in Table WQN16.
3. Was there any information/evidence before the Canterbury Regional Council which was reasonably capable of supporting the inclusion of the following waterbodies in Schedule WQ5 such that damming should become a non complying or prohibited activity:
 - 3.1 The Hurunui River mainstem from above the Mandamus River confluence (at or about M33:736-238) to the Lake Sumner outlet (at or about M32:506-314) and the Mandamus River mainstem within Table WQN18.
 - 3.2 The Hurunui and Mandamus Rivers from the Mandamus River confluence (at or about M33:736 – 238) to the headwaters within Table WQN16.
 - 3.3 The Hurunui River (and tributaries) within Policy WQN1.
4. Did the Canterbury Regional Council have particular regard to the vision and principles of the Canterbury Water Management Strategy?

5. Did the decision of the Canterbury Regional Council give effect to the Canterbury Regional Policy Statement?
6. Is the level of protection afforded to water bodies under Policy WQN1 and rule WQN25 consistent with section 5 of the Resource Management Act?
7. Was the Canterbury Regional Council correct in concluding that the LTCCP is the operative document to promote water storage options and augmentation projects, rather than the NRRP?
8. Does Rule WQN25 implement Policy WQN1?
9. Is plan provision 5.4.1.1 and Policy WQN1, including the use of the terms “full flow” and “no significant adverse effect” void for uncertainty?
10. Is the use of the phrase “no significant adverse effect” in plan provision 5.4.1.1 and Policy WQN1 contrary to section 104D of the Resource Management Act?
11. Did the Canterbury Regional Council have particular regard to the actual or potential effects on the environment of damming activities as required by section 68(3) of the Resource Management Act 1991.

C. Grounds for Appeal:

D. First and second errors of law:

1. The Court of Appeal in *Coromandel Watchdog of Hauraki Inc v Chief Executive of the Ministry of Economic Development* [2008] 1 NZLR 562; [2008] NZRMA 77 (CA) held that a local authority can use the prohibited activity status for activities for which, having undertaken the processes required by the RMA, it could rationally conclude that prohibited activity status was the most appropriate status.
2. Prohibited activity status is not the most appropriate status and as such the test in *Coromandel Watchdog* (supra) has not been satisfied.

3. The Canterbury Regional Council did not follow the process required to be followed before a prohibited activity status is applied as set out at paragraphs [23] – [31] of *Coromandel Watchdog*.

4. There was no section 32 evaluation of the appropriateness of Policy WQN1 and Rule WQN25 in terms of the Hurunui River. The assessment does not provide any assessment of the extent to which Policy WQN1 is appropriate in achieving the objective of sustainable management. The evaluation of alternatives does not address the issue of whether the use of prohibited activity status is the most appropriate of the options available for those water bodies listed in Table WQN18. Nor does it address whether non complying is the most appropriate status for those water bodies listed in Table WQN16.

5. As stated in the section 32 update document:

The s32 analysis notified with Variation 1 evaluated options regarding Policies WQN1 and WQN2. The alternative option evaluated in each case was to have no such policy.

6. Section 32(4) requires that for the purposes of the examination referred to in section 32(3), an evaluation must take into account the benefits and costs of policies, rules or other methods; and

7. The section 32 update document states that:

The panel agrees with that analysis, although the social and economic costs may have been understated. Overall however there is a clear justification in having a policy or policies that provide some protection of flows in highly valued water bodies.

8. Having said that, the updated section 32 document does not go on to evaluate the social and economic costs with respect to Policy WQN1. The evaluation of Policy WQN1 and Rule WQN25 does not contain any assessment of the social and economic benefits of irrigation, hydroelectricity of water storage or augmentation practices. Nor does it give consideration to the impacts of a total prohibition on damming on waterbodies listed in Table WQN18, including on water storage proposals.

E. Third Error of Law

9. The high naturalness water bodies originated from the document Daly A, Canterbury Rivers, Lakes “Inventory of Instream Values” document (U02/45) with corroboration from studies by Grindell 1984 and Guest in 1986. Document U02/45 and a more recent report by Daly 2003 are both “desktop analysis” of the Inventory of Lakes and Streams.

10. At page 14 of Decision Report 16 it is stated:

Regional Council staff reviewed reports on the region’s water bodies to identify water bodies that should be sustained as far as possible in their natural state. These reports are usefully summarised by A.Daly, who has produced a number of inventories i.e. Inventory of Instream Values for Rivers and Lakes of Canterbury New Zealand, and this is referred to in the NRRP. These inventories are a ‘desktop exercise’ that draw together existing information about instream values for all 46 primary catchments. One of its stated purposes is to serve as a starting point for information to assist the Regional Council with any of its functions, e.g. preparation of regional plans and processing of resource consents. It states that no field work has been done to verify the values on the ground, and that the information cannot be relied upon without either field checking or reference to the original documents cited in its reference list. However, staff reviewed the original documents in compiling the list of water bodies. Regard was also had to resource consents issued for takes from the region’s rivers. Also the nature of land use and development alongside these water bodies was noted. Ultimately, we have had to judge which water bodies to include and where to draw the boundaries.

11. The Council’s decision states at page 53 of Decision Report 16 that:

... while recognising that the inclusion and extent of the water bodies in Policy WQn1 (and 2) is a judgement call that has been made at a broadbrush level.

12. The Canterbury Regional Policy Statement emphasises the importance of investigating water bodies to identify values to enable community choices about

how best to provide for their wellbeing. However no further investigations were done.

13. There is no information/evidence that supports the conclusion that the Hurunui River (Lake Sumner outlet to confluence of the Mandamus River) is a high naturalness water body containing the values identified in Table WQN18 that is worthy of protection by way of prohibited activity status.

F. Fourth error of law:

14. Section 63 of the Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010 provides:

In considering any proposed regional policy statement or plan, ECan must have particular regard to the vision and principles of the CWMS in addition to the matters relevant under the RMA to its decisions made under clause 10(1) of Schedule 1 of that Act.

15. The vision of the CWMS is:

To enable present and future generations to gain the greatest social, economic, recreational and cultural benefits from our water resources within an environmentally sustainable framework.

16. One of the primary principles of the CWMS is that the need for efficient use of water in existing and new infrastructure is recognised. A supporting principle is that water resources are used sustainably to enhance the quality of life and that where water is abstracted, it is used effectively and efficiently.
17. The Canterbury Regional Council in formulating plan provision 5.4.1.1 regarding high naturalness water bodies and associated Policy WQN1 and Rule WQN25 did not give particular regard to this vision or the principle referred to above.
18. The Canterbury Regional Council prepared a document entitled “Particular regard to the Canterbury Water Management Strategy (CWMS)” in which it was commented that the direction to have particular regard to the vision and principles of the CWMS *came very late in the decision making process – indeed at a time when decisions were more than 95% complete.* Despite these

comments of the Commissioners, the requirement to have particular regard to the CWMS is a statutory requirement.

G. Fifth error of Law

19. The emphasis in the Canterbury Regional Policy Statement is on enabling people and communities to provide for their well being. The decision of the Canterbury Regional Council does not give effect to the provisions of the Canterbury Regional Policy Statement, including:

19.1 Objective 1, the focus of which is to achieve sufficient water quantities in the region's water bodies to enable people and communities (both present and future generations) to provide for their cultural, social, recreational and economic well being whilst safeguarding the life supporting capacity of water both as drinking water for people and for aquatic ecological purposes and cultural needs.

19.2 Policy 2 which sets out an aim of enhancing the availability of water for present and future generations through increased efficiency of use, augmentation or storage.

19.3 Policy 3 which is to promote the efficient use of water.

19.4 Policy 4 which directs the Council to investigate and provide for water bodies that should be sustained as far as possible in their natural state. The Council has purported to provide for the protection of High Naturalness water bodies without investigating the values (natural, social and economic) of the region's resources.

19.5 9.5 Methods which sets out the process of preparing plan provisions at page 140, paragraphs (i) – (vi).

H. Sixth error of law:

20. By prohibiting the damming of the Hurunui River, and by requiring no significant adverse effects on the values identified for those parts of the waterbody where damming is not prohibited, the Canterbury Regional Council provided a level of protection that was not warranted, and elevated protection of natural values over

other Part II matters including the positive social and economic benefits of water storage, augmentation, irrigation and hydro electricity supply.

21. The Introduction to the Decisions states:

Many of the submitters considered that the plan as notified suffered from too much emphasis on environmental matters, with too little emphasis on the needs of people and communities. We broadly agreed with that view, and so we have tried throughout our decisions on the NRRP to redress that balance. But we think that this is an issue that Environment Canterbury needs to address with some rigour...

22. However this has not been addressed with respect to the provisions relating to high naturalness water bodies.

23. The decision takes a very narrow view of the environmental, social and economic benefits to be considered. For example page 81 of Decision Report 16 states:

Submissions 509.86 (supported by 615.89), 510.82, and 550.39 seek Policy WQN2 be amended to recognise the environmental, social and economic benefits associated with the taking or diverting of water and the ability of water storage to assist with water flows and meeting water flow regimes. The submitters state that Policy WQN2 intends to reduce or cease any taking or diverting within the water bodies in accordance with the flow regimes set and does not recognise these other benefits etc.

Assessment

*These submissions request taking into account wider community values and social and economic benefits. We have done just that in deciding which rivers and lakes should be protected by the provisions of the NRRP. The amended Policy WQN1 identifies those water bodies which we consider to have significant natural values that are worthy of protection. **This meets the wider community view that some water bodies within the region should not be subject to significant modification.** For this reason the submissions are rejected and no amendment is required. (emphasis added)*

24. The decision does not correctly assess the impact of the prohibited activity rule on water storage proposals which is relevant in determining whether the provisions are consistent with section 5 of the Act. For example, the appellant sought an amendment to Objective WQN8 (Augmentation of Water Bodies) to state the net benefit to the wider community in terms of future water storage, irrigation and hydro generation opportunities. This was rejected in Decision Report 11 where it was incorrectly stated at page 22:

We consider that Objective WQN8, as worded, does not preclude the outcome sought by these submitters, although Policy WQN1 limits the application of this provision to some extent in high naturalness waterbodies ... Future water storage, irrigation, or hydro-generation opportunities are not foreclosed, as the objective does not preclude certain activities from being considered on a case-by-case basis at any time.

I. **Seventh error of law:**

25. The Appellant sought that plan provision 5.4.4 be amended to actively promote water storage options and augmentation projects.
26. The Appellant also sought that Policy WQN5 (review existing minimum flow) be rewritten to promote water storage options including identifying specific sites where water storage facilities will be encouraged by Council and to consider specific planning mechanisms to provide for these facilities, such as a special zone.
27. The decision states that the LTCCP is the appropriate place to promote water storage options and augmentation projects, rather than the NRRP (Decision Report 5, page 116). It is also stated that development of a regional approach to water augmentation is part of the Canterbury Water Management Strategy, which in time will develop a regional water storage plan.
28. Regional Councils are required by section 66 of the Resource Management Act 1991 to prepare a change to a regional plan in accordance with the provisions of Part 2. The Council's decision that the LTCCP is the most appropriate place to promote water storage options fails to recognise that the purpose of the Act is to "promote" sustainable management (section 5).

J. Eighth error of law:

29. Policy WQN1 states that it is only where the “full flow” is dammed that damming is prohibited, but the rule implementing the policy (rule WQN25) contains no such element. Rather Rule WQN25 relates simply to “the damming of water in the bed of a surface water body.”

K. Ninth error of law:

30. Plan Provision 5.4.1.1 and related policies introduce the phrases “full flow” and “no significant adverse effect” which are undefined in the NRRP. The decision does not provide any explanation of the intent, nor does the section 32 analysis.

31. These terms could be interpreted in a number of different ways. The damming of the “full flow” is required before an application is assessed as a prohibited activity. It would not be possible for an applicant to establish whether any given proposal involving a control structure would be a prohibited activity under rule WQN25 on reading the provisions of NRRP and therefore whether an application could be made.

32. The term “significant” is used in the Resource Management Act 1991 for describing the value of a resource (i.e. significant indigenous vegetation). It is not used as a term within the Act for describing the level of effect. If a proposal were to have a significant effect on the values listed in Policy WQN1 then it would not be open to the Council to grant consent as it would be contrary to the objectives and policies of the NRRP and would have effects that are more than minor and would therefore not be able to satisfy either gateway test in section 104D. A person deciding whether to make an application would not be able to establish whether this would be the case as it would be unknown how the Council interprets the phrase “no significant adverse effect.”

33. The absence of a definition for both “full flow” and “no significant adverse effect” makes the issue and policy void for uncertainty.

L. Tenth Error of Law:

34. Policy WQN1(2)(b) states that there must be “no significant adverse effect” on the values listed.

35. This policy applies to applications for non complying activities.
36. The effect is to create a “de facto” prohibited activity status for these projects by importing a higher test regarding the level of effect into the alternative gateway test set out in section 104D.
37. It should be open to an applicant, who is unable to satisfy the test set out in section 104D(1)(a) i.e. that the adverse effects of the activity on the environment will be minor, to demonstrate that the proposal is not contrary to the objectives and policies of the Plan, without this test also being dependent on an assessment of the level of effect.

M. Eleventh Error of law:

38. Section 68(3) requires that:

In making a rule, the regional council shall have regard to the actual or potential effect on the environment of activities, including, in particular, any adverse effect

39. The Canterbury Regional Council in formulating the provisions relating to high naturalness water bodies did not have regard to the actual or potential effects of damming activities. Rather the Council’s decision to prohibit damming flows from an assessment of the values of those water bodies without an assessment of the magnitude or nature of those effects.

40. For example the decision states at page 119 of Decision Report 16 that:

The mainstem of the Hurunui River has extremely high values for activities such as kayaking and trout angling, and is an attractive and in places quite wild and scenic river. Accordingly we think that the damming of the full flow of the mainstem should be prohibited. Similarly the Mandamus River has what we consider to be high natural values, and so we have also decided to prohibit damming of the full flow of that river.

41. At page 90 it is stated that:

We have also decided that any damming of the full flow of the mainstems of these rivers (the Hurunui between the Mandamus and outlet to Lake Sumner and the Mandamus) should be prohibited as any such damming would have unacceptable adverse effects on those rivers and the landscape they have helped form.

N. The Appellant seeks the following orders:

42. That the Canterbury Regional Council's decision on plan provisions 5.4.4; 5.4.1.1; Policy WQN1 and associated methods; Rule WQN25 and Schedule WQN5 be quashed and either:
 43. That these provisions be amended to:
 - 43.1 remove references to the Hurunui River from Schedule WQN5 and Policy WQN1.
 - 43.2 remove references to damming of the full flow of water bodies of high naturalness being prohibited.
 - 43.3 provide for the damming of the mainstem and tributaries of rivers in the high naturalness category as restricted discretionary activities with Council restricting its discretion to the permitted activity standards that cannot be met.
 - 43.4 define the term "full flow" so as to exclude damming that provides a residual flow.
 - 43.5 remove reference to the requirement to there being "no significant adverse effects" on the matters listed.
 - 43.6 recognise that non consumptive uses including short canals and instream dams have little effect on the degree of naturalness of a water body and exclude these activities from the schedule.
 - 43.7 provide for objectives/policies/rules so as to promote water storage options and rules including identifying specific sites where water storage facilities will be encouraged by council.


43.8 amend plan provision 5.4.4 to actively promote water storage options and augmentation projects.

44. Or, that the Canterbury Regional Council be ordered to reconsider these provisions in light of the findings of the High Court.

45. Such other relief as would satisfy the concerns of the appellant.

46. The appellant seeks costs.

Dated 16 November 2010



Ewan Chapman / Shoshona Goodall
Solicitors for the Appellant

This document is filed by Ewan Chapman of Duncan Cotterill, Solicitor for the Appellant.

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